Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

QUINTON DRYDEN, et al.,

Petitioners,

v.

MADISON COUNTY, FLORIDA,

Respondent.

On Petition For Writ Of Certiorari To The Florida Supreme Court

PETITION FOR WRIT OF CERTIORARI

LARRY E. LEVY
Fla. Bar No. 047019
Counsel of Record
LOREN E. LEVY
Fla. Bar No. 0814441
THE LEVY LAW FIRM
1828 Riggins Road
Tallahassee, Florida 32308
850/219-0220

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Whether petitioners are entitled to meaningful retrospective relief as held in *McKesson Corp. v Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), where impositions imposed by respondent, Madison County, Florida, a political subdivision of the State of Florida pursuant to a coercive statutory scheme where no statutory predeprivation mechanism is provided to challenge same, are held invalid, null, and void.

2. Whether the Florida Supreme Court's decision on remand results in prospective only application of judicial decisions, and violates petitioners' rights secured by the Fourteenth Amendment of the United States Constitution, in conflict with *Newsweek, Inc. v. Department of Revenue*, 118 S.Ct. 904 (1998), *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 498 U.S. 18 (1990), *Reynoldsville Casket Co. v. Hyde*, 115 S.Ct. 1745 (1995), *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993), *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), *Griffith v. Kentucky*, 479 U.S. 314 (1987), *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), and *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).

PARTIES TO PROCEEDING

This case was certified as a class-action suit by the Third Judicial Circuit Court in and for Madison County, Florida, on January 3, 1991. Petitioners are class members who are both homestead and non-homestead property owners in Madison County, Florida. The named class representatives are Frank Guntner and Lucille Stallworth. The respondent is Madison County, Florida, a political subdivision of the State of Florida.

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PETITION FOR WRIT OF CERTIORARI

Quinton Dryden, et al., (petitioners) respectively pray that a writ of certiorari issue to review the decision of the Florida Supreme Court rendered on January 21, 1999 (App. 1a-15a) The decision was rendered after this Court previously had vacated the Florida Supreme Court's initial decision, published at 696 So.2d 728 (Fla. 1997) (18a-32a), and remanded same to the Florida Supreme Court citing *Newsweek, Inc. v. Florida Department of Revenue*, 118 S.Ct. 904 (1998). (16a-17a) Petitioners seek this writ of certiorari to resolve the conflict between the Florida Supreme Court's decision on remand and decisions of this Court, including *Newsweek*, on the important issues presented herein.

OPINIONS BELOW

The opinion of the Florida Supreme Court that gives rise to this petition was decided January 21, 1999, and is published at 24 Fla. L. Weekly S47 (Fla. Jan. 21, 1999). It is reprinted in the appendix hereto ("App. 1a-15a"). The previous opinion of the Florida Supreme Court which was before this Court on petition for writ of certiorari, No. 97-625, which was granted on March 2, 1998, is published at 696 So.2d 728 (Fla. 1997). It is reprinted in the appendix hereto (App. 18a-32a) The Florida First District Court of Appeal's decision is published at 672 So.2d 840 (Fla. 1st DCA 1996). (App. 33a-41a) The Florida

Third Judicial Circuit Court's decision is unpublished. (App. 42a-67a)

JURISDICTION

The Florida Supreme Court's decision was rendered on January 21, 1999, (App. 1a-15a) on remand from this Court's decision granting a previous petition for writ of certiorari, No. 97-625, citing *Newsweek, Inc. v. Florida Department of Revenue*, 118 S.Ct. 904 (1998). (16a-17a) The federal constitutional basis for relief was asserted by the petitioners before the trial court (App. 42a-67a), on remand from the First District Court of Appeal, before the First District Court and the Florida Supreme Court, and before this Court in the previous petition for writ of certiorari, No. 97-625.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). This petition is timely submitted pursuant to United States Supreme Court Rule 13.3.

CONSTITUTIONAL AMENDMENT INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> **Section 1.** All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On remand from the United States Supreme Court, resulting from the petitioners' previous petition for writ of certiorari, No. 97-625, the majority of the members of the Florida Supreme Court, in a 4-3 decision, held that *Newsweek, Inc. v. Florida Department of Revenue*, 118 S.Ct. 904 (1998), which was cited by this Court in its order granting certiorari, vacating the Florida Supreme Court's decision and remanding same, was inapplicable and that the case was not a tax remedy case. In its decision, the Florida Supreme Court stated:

> The United States Supreme Court subsequently vacated our decision in *Dryden* in light of its just-released opinion in *Newsweek, Inc. v. Florida Dep't of Revenue*, 118 S. Ct. 904 (1998). The decision vacating *Dryden* was brief and without analysis:
>
> > On petition for writ of certiorari to the Supreme Court of Florida. Petition for writ of certiorari granted. Judgment is vacated and the case is remanded to the Supreme Court of Florida for further consideration in light of *Newsweek, Inc. v. Florida Department of Revenue*, 522 U.S. ___, 118 S. Ct. 904, 139 L. Ed. 2d 888 (1998).
>
> *Dryden v. Madison County*, 118 S. Ct. 1162 (1998). This Court ordered briefing by the parties concerning the effect of *Newsweek* on our decision in *Dryden* and Dryden now contends that *Newsweek* mandates a refund. We disagree.

Dryden, 24 Fla. L. Weekly at S48. (App. 2a-3a) After discussing *Newsweek*, the Florida Supreme Court stated:

> *Newsweek* is inapplicable to the present case. The United States Supreme Court in *Newsweek* never reached the merits of the refund issue but rather focused only on the remedy that must be made available to a taxpayer seeking an adjudication on the merits of a refund claim. Specifically, the federal Court held that a taxpayer cannot be cut off from a remedy, or avenue of redress, upon which the taxpayer has reasonably relied. The taxpayer is entitled to proceed upon that avenue and at some point obtain an adjudication – either yea or nay – on the merits of his or her refund claim.

Dryden, 24 Fla. L. Weekly at S48. (App. 4a-5a) Thereafter the court stated:

> The analysis in *Newsweek*, which focuses on a taxpayer's remedy for seeking a refund, is inapplicable to this "merits" case. Simply put: The remedy here is not in issue and never has been.

Dryden, 24 Fla. L. Weekly at S48. (App. 6a)

In a firmly worded dissent, Justice Wells stated:

> I dissent because the majority errs in concluding that the United States Supreme Court's vacation of this Court's judgment in this cause and remand to us for further consideration in light of *Newsweek, Inc. v. Florida Department of Revenue*, 118 S. Ct. 904 (1998), should have no impact upon our decision in this case.

Dryden, 24 Fla. L. Weekly at S48. (App. 6a-7a) Thereafter, the dissent recognized the import of *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 498 U.S. 18 (1990), and *Newsweek*, stating:

My reading of the *Newsweek* decision finds two clear statements by the United States Supreme Court which, when applied to this case, require rescinding the remanded judgment and opinion of this court. In the first statement, the Court noted with approval the Florida First District Court of Appeal's acknowledgment of the requirement of *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), that there be a "meaningful backward-looking relief when a taxpayer is forced to pay a tax before having an opportunity to establish its unconstitutionality." *Newsweek*, 118 S. Ct. at 904. In the second statement, the Court held that:

> While Florida may be free to require taxpayers to litigate first and pay later, due process prevents it from applying this requirement to taxpayers, like *Newsweek* who reasonably relied on the apparent availability of a postpayment refund when paying the tax.
>
> Newsweek is entitled to a clear and certain remedy and thus it can use the refund procedures to adjudicate the merits of its claim.

Newsweek, 118 S. Ct. at 905.

Dryden, 24 Fla. L. Weekly at S48. (App. 7a) Justice Wells stated:

> *Newsweek* reinforces the fact that when the state or a state-authorized taxing unit subjects a taxpayer to an unauthorized payment, *McKesson* requires either (1) a "predeprivation process" authorizing taxpayers to challenge the validity of a payment prior to making the payment, or (2) postpayment "meaningful relief." If no prepayment procedure exists, as in this case, then postpayment "meaningful relief" must include a refund if the taxpayer has a meritorious claim. It

> is an unescapable fact that the act of refunding money to the taxpayer is what makes the relief meaningful.
>
> The majority gives the vacation of the judgment an empty meaning by asserting that:
>
> > [This] is not a tax "remedy" case. . . . Dryden has proceeded via the postpayment route. . . . Rather, the parties and courts have viewed the availability of the postpayment remedy as a "given" in this case and have focused exclusively on the merits of Dryden's refund claim (i. e., on whether Dryden and other taxpayers are in fact due a refund). This case thus begins precisely where *Newsweek* left off.
> >
> > Majority op. at 4.

Dryden, 24 Fla. L. Weekly at S49. (App. 7a-8a)

Thereafter, Justice Wells reviewed the case in its posture certified from the First District Court of Appeal pointing out that, in *McKesson*, this Court had held " . . . that a post-payment remedy was *mandatory* in a situation in which no prepayment procedure existed and that remedy had to be a refund or its equivalent." *Dryden*, 24 Fla. L. Weekly at S49. (App. 9a) Justice Wells' comments on the situation in *McKesson* and that in the case at bar in a footnote stating:

> In *McKesson*, the only reason a refund was not specifically ordered was that the challenged liquor tax was not found to be invalid in its entirety but rather was invalid only insofar as it operated in a manner that discriminated against interstate commerce. Therefore, the Supreme Court allowed either a refund or other retroactive relief that would cure the discrimination. *McKesson*, 496 U.S. at 51. In this case, the assessments were held to be null and void based on

> the county's failure to substantially comply with the statutory authority under which is purported to act. *See Madison County v. Foxx*, 636 So.2d 39, 48 (Fla. 1st DCA 1994).

Dryden, 24 Fla. L. Weekly n.3. at S50. (App. 8a-9a)

The dissent pointed out that *McKesson* made it patently clear, by citing *Ward v. Love County Board of Comm'rs*, 253 U.S. 17 (1920), and *Carpenter v. Shaw*, 280 U.S. 363 (1930), that where there was *no* corrective action by the state which could cure the invalidity of the tax, the state " . . . would have no choice but to 'undo' the unlawful deprivation by refunding the tax previously paid under duress, because allowing the state to 'collect these unlawful taxes by coercive means and not incur any obligation to pay them back' . . . would be in contravention of the Fourteenth Amendment." *Dryden*, 24 Fla. L. Weekly at S49 (quoting *McKesson*, 496 U.S. at 39, quoting *Ward*, 253 U.S. at 24) (emphasis added). (App. 9a)

Further, the dissent recognizes that refusing to order a refund as the majority had done, was patently discriminatory and inequitable stating:

> In this case, however, we plainly are in error if we continue to ignore, as the majority does, just how patently discriminatory and inequitable the refusal to refund the payment is in this case. The Madison County assessments were treated identically to ad valorem taxes insofar as collection was concerned. No prepayment mechanism existed for challenging the assessments. If assessments were not paid, liens attached to the property owners' real property, and upon becoming delinquent, the amount of the liens accrued interest at eighteen percent per annum. Nonpayment resulted in the sale of tax assessment certificates.

> Precisely contrary to the majority's assertion in its footnote 2, the assessments did not apply across the board to all property owners in this case. Approximately one-half of the property owners in Madison County did not pay the assessments, and liens attached to their properties. Subsequently, the County canceled the liens by purchasing all assessment certificates sold to third parties for nonpayment. In reality, the property owners who did not pay, and thus failed to comply with the law, never had to pay. On the other hand, the property owners who complied with the law, which was later found to be invalid, were the only property owners who had to pay.

Dryden, 24 Fla. L. Weekly at S49. (App. 13a) The petitioners again petition this Court to review the supreme court's majority decision on remand which held that the case this Court cited in its order of vacation and remand, *Newsweek* was inapplicable and that this was not a tax remedy case.

This case arose with the filing of a class action complaint in June 1990 for declaratory judgment and supplemental relief pursuant to chapter 86, Florida Statutes (1989), by petitioners in Madison County, Florida. (App. 104a) The complaint sought to have certain county levies labeled "special assessments/non-ad valorem assessment" and levied pursuant to county ordinances declared illegal, null, and void, in violation of the petitioners' rights secured by the due process and equal protection clauses of the Florida and Federal Constitutions, the Florida Constitution's homestead protections, and several Florida Statutes. The complaint also sought to have the

county refund all monies collected pursuant to said ordinances. Petitioners included homeowners who had paid the impositions and those who did not pay.

Subsequent to the filing of the complaint, the county amended its 1989 ordinances by adopting ordinances in 1990. The original ordinances were adopted in August 1989, and imposed the assessments as of January 1, 1989, and subsequent years.

After discovery and a hearing, the trial court entered its final judgment on November 25, 1991, finding that the ordinances and levies were invalid for various reasons and ordered the county to refund all assessments levied pursuant thereto for years 1989 and 1990. (App. 102a-117a) After suit was filed in June 1990, the county continued to assess, collect, and spend money collected and continued to do so after filing its appeal.

On appeal, the First District Court of Appeal affirmed the trial court's decision holding the ordinances invalid and the levies null and void but vacated that part of the judgment which had ordered refunds, finding same premature. *Madison County v. Foxx*, 636 So.2d 39 (Fla. 1st DCA 1994) (App. 68a-101a) This Court's opinion in *McKesson* was extant when the district court rendered its decision but it was not addressed by the court.

While the case was on appeal to the district court, the county continued to levy and collect the assessments for years 1991, 1992, and 1993 pursuant to the ordinances and advertised and sold certificates for nonpayment of assessments for 1990. (App. 52a) During the appeal, petitioners filed a separate lawsuit in 1991 on the same grounds as had been asserted in the first lawsuit challenging the 1989 and 1990 ordinances and levies for 1991 imposed pursuant thereto. To avoid another sale of certificates for

nonpayment, the parties entered into a stipulation on May 27, 1992. Pursuant to the stipulation, the trial court ordered that assessment certificates and assessment deeds would not be sold but permitted the county to continue to assess and collect assessments; provided that all money collected should be retained to make whatever refunds ultimately were ordered. (App. 52a-53a)

The 1991 complaint subsequently was amended to add challenges to the levies for years 1992 and 1993 while the case was pending on appeal. A similar stipulation and order was executed and entered in March 1993, so that no further assessment certificates or assessment deeds would be sold. The county, however, continued to assess, collect, and spend the money notwithstanding the court's injunction to hold all money collected.

On remand from the district court's decision, the two cases were consolidated pursuant to the parties' agreement that, since the issues were identical, the decision as to the validity of the ordinances and levies in the first case controlled the validity of the ordinances and levies for the second case. After hearing and testimony, the trial court entered its Order on Remand in which it ordered refunds for all years involved in the second lawsuit, which were years 1991, 1992, and 1993. The trial court, however, held that the county had acted in good faith in its levies and denied refunds for years 1989 or 1990. (App. 42a-67a) In rendering its order the trial court made a *factual finding* that the effect of denying refunds for all litigants violated the equal protection clause stating:

> Thus, in its present posture, the County is asking this Court to deny refunds to those who did pay, even though many property owners never paid. This certainly is not fair and does not treat those who did pay and those who did

> not pay the same. Equal treatment is required of all so that no one should be treated differently. This is recognized in *McKesson* which also points out that failure to give refunds of monies unlawfully collected constitutes a denial of due process. At bar, it would also constitute a denial of equal protection of the law.

(App. 64a-65a)

When the assessments originally were levied, many persons in Madison County refused to pay the assessments. As a result, liens attached to their property and assessment certificates were sold to bidders for nonpayment which provided for 18 percent interest if redeemed.

After the district court ruled in the first case that the ordinances and levies were invalid, the county repurchased all the assessment certificates sold, paid 18 percent interest thereon, and canceled all the liens for persons who had not paid during the five-year period. (App. 64a) During this five-year period, the percentage of persons who did not pay the levies is as follows: 1989 – 60%; 1990 – 50%; 1991 – 50%; 1992 – 56%; and 1993 – 71%.

Dryden appealed the Order on Remand to the First District Court of Appeal. The county cross-appealed, citing as error the trial court's order finding that the refunds were entitled to interest pursuant to section 55.04, Florida Statutes (Supp. 1994), which provides for interest on all final judgments. The county did not appeal that part of the trial court's judgment ordering refunds for years 1991, 1992, and 1993.

On appeal, the First District Court of Appeal affirmed the trial court's finding that good faith was still a defense which could be used by a county to avoid making refunds, notwithstanding *McKesson*. The district court also reversed that part of the trial court's order

awarding interest, and certified a question to the Florida Supreme Court. (App. 33a-41a) The Florida Supreme Court upheld the district court's decision. (App. 18a-32a)

Petitioners sought review of the Florida Supreme Court's initial decision in *Dryden*. This Court granted jurisdiction, vacated the Florida Supreme Court's decision, and remanded same for further consideration in light of this Court's decision in *Newsweek*, issued the same day. *Dryden v. Madison County*, 118 S.Ct. 1162 (1998). (App. 16a-17a) On remand, the Florida Supreme Court ordered briefing concerning the effect of *Newsweek* on its initial decision in *Dryden*, and then issued the opinion which is the subject of this petition for writ of certiorari. (App. 1a-15a)

Petitioners seek review of the Florida Supreme Court's second decision in *Dryden*, on whether the decision denying refunds contravenes their rights secured by the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. The trial court had held that the effect of denying refunds for all litigants violated the equal protection clause and denied due process. (App. 64a-65a)

The petitioners submit that the Florida Supreme Court's second decision in *Dryden* is in direct conflict with *Newsweek*, *McKesson*, *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993), *James B. Distilling Co. v. Georgia*, 501 U.S. 529 (1991), *Griffith v. Kentucky*, 479 U.S. 314 (1987), and *Ward v. Love County Board of Comm'rs*, 253 U.S. 17 (1920).

In its decision on remand, the Florida Supreme Court cited both *Newsweek* and *McKesson*, and held that *Newsweek* was inapplicable. The Florida Supreme Court construed the import of *Newsweek* to require that a taxpayer

cannot be cut off from a remedy or avenue of redress and that a taxpayer " . . . is entitled to proceed upon the avenue and at some point obtain an adjudication – either yea or nay – on the merits of his or her refund claim," and that is the only "remedy" required. *Dryden*, 24 Fla. L. Weekly at S48. (App. 5a) It then concluded that, since petitioners had obtained adjudications on the merits of their claims at three separate levels, that even though the assessments were held null, void, and invalid, the availability of the judicial proceeding to determine this was all that was required and petitioners had no right to post-deprivation remedy. The supreme court's majority opinion stated "[s]imply put: The remedy here is not in issue and never has been." *Dryden*, 23 Fla. L. Weekly at S48. (App. 6a)

STATEMENT OF THE FACTS

Madison County is a long county, approximately 35 miles long and 40 miles wide located in north central Florida, and its northern boundary is the Florida-Georgia state line. It is largely a rural county with a population of approximately 16,500, and the largest city is the City of Madison which has a population of approximately 3,500. (1995 estimates)

Prior to 1981, Madison County funded garbage disposal, landfill operations, ambulance services, and fire protection in the rural areas of the county, either from ad valorem taxes or from a combination of ad valorem taxes and fees charged for the various services rendered. For instance, persons using ambulance services were billed for the service furnished and either paid the bill directly or paid it through the individual's insurance. The City of

Madison has a fire department which, by agreement with the county, also answers fire calls within a close radius of the City of Madison when possible. Since it is a rural farming and forestry area, fire service in the rural area also is provided by the Florida Forestry Service.

Garbage disposal in the rural area of the county consists of garbage disposal and collection centers scattered throughout the county. These "green boxes" are used by both property owners and non-property owners as well as transients who either carry their household garbage to such disposal areas or carry it directly to the county landfill. No house-to-house garbage collection service was provided either before or after the adoption of the ordinances and the imposition of the levies challenged. A charge was made for fire service if county fire service responded to a call. After the adoption of the 1989 ordinances, in which the assessments challenged were imposed, the garbage collection and landfill operation, as well as the fire and ambulance operations, continued to be operated in the same manner and through essentially the same facilities as prior to 1989.

Each of the ordinances levied a specific charge referred to as special assessments/non-ad valorem assessments, and the county used money collected pursuant to the assessments to fund the operation of that particular service. The charges levied were in addition to the ad valorem taxes levied by the county.

The impositions characterized as "special assessments" were levied beginning in 1989 and continuing through 1993 pursuant to ordinances which were adopted in 1989 and 1990. Under Florida law, the levies were collected in the same manner as ad valorem taxes and became a lien on the property. The assessments were

collected through the sale of a certificate similar to the procedure for the sale of an ad valorem tax certificate. If the assessments were not paid, certificates were sold which could result in a tax deed upon application being made therefore. *See* §§ 197.363, 197.3632, Fla. Stat. (1997).

The citizens and property owners of Madison County vigorously opposed the levy and, as a result, many persons refused to pay and liens attached to their property and certificates were sold for nonpayment. After the district court's decision upholding the trial court's finding that the levies were invalid and void, the county acquired all outstanding assessment certificates and paid 18 percent interest thereon. (App. 64a) All liens levied for nonpayment were therefore extinguished but those party owners who paid the assessments and filed suit challenging same, and the class members did not receive refunds.

REASONS FOR GRANTING THE WRIT

I. **The due process clause of the Fourteenth Amendment of the United States Constitution requires that monies paid to discharge impositions collected pursuant to a coercive statutory scheme, levied pursuant to county ordinances, which such impositions and ordinances were subsequently held null and void, be refunded where no predeprivation statutory mechanism exists to challenge the impositions, and no other post-deprivation remedy is available.**

The Florida Supreme Court's decision conflicts with this Court's decisions in *Newsweek, Reich v. Collins*, 573 U.S. 106 (1994), *Harper, McKesson*, and *Ward*. It is undisputed that Florida has provided no predeprivation statutory mechanism and that no postdeprivation remedy is

available, other than refunds, which will treat the property owners who paid the assessments the same as those who did not pay the assessments. The only statute applicable to the maintenance of the instant suit is that found in sections 95.11(3)(m) and (p), Florida Statutes (1997), which provides a four-year time period for such suits.[1] As the dissent points out, this Court's original decision granting the writ and vacating the Florida Supreme Court's prior decision is rendered meaningless based on the majority decision.

In *McKesson*, this Court reversed a Florida Supreme Court decision which had held that the state was not required to refund monies collected unlawfully by relying upon *Gulesian v. Dade County School Bd.*, 281 So.2d 325 (Fla. 1973) for the proposition that, if the court finds "good faith," refunds need not be made. At bar, suit was filed in June 1990, and decided in the trial court on November 25, 1991. (App. 43a) On June 4, 1990, this Court in *McKesson* reversed the Florida Supreme Court's decision denying refunds which had, as has the Florida Supreme Court here, relied on *Gulesian* as authority for denying refunds.

McKesson held that, if a state derives an exaction under a coercive scheme which penalizes taxpayers for failure to remit their taxes in a timely fashion, thus requiring them to pay first and obtain review of the

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[1] A similar case presently pending on rehearing also involves assessments/non-ad valorem assessments levied pursuant to the same statutes involved in the instant case. *Atlantic Gulf Comm. Corp. v. City of Port St. Lucie*, 24 Fla. L. Weekly D650 (Fla. 4th DCA Mar. 10, 1999). In that case, the district court, after holding the assessments/non-ad valorem assessments invalid, ordered refunds.

levies' validity later, the due process clause of the Fourteenth Amendment requires the state to afford meaningful post payment relief for the illegal taxes already paid. *McKesson* recognized that an unlawful exaction "constitutes a deprivation of property under the due process clause." 496 U.S. at 19. As *McKesson* stated:

> Since Florida has established various financial sanctions and summary remedies to encourage liquor distributors to tender tax payments *before* resolution of any dispute over the tax's validity, the State does not provide a meaningful opportunity for predeprivation relief. Thus, in a post-deprivation refund action, the State must provide distributors not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a "clear and certain remedy," *O'Connor, supra*, 223 U.S., at 285, 32 S.Ct., at 217, for any erroneous or unlawful tax collection.

496 U.S. at 19. That is what this Court meant when it further stated that:

> Neither of the "equitable considerations" cited by the State Supreme Court is sufficient to override the constitutional requirement of retrospective relief.

McKesson, 496 U.S. at 20. *McKesson* set forth due process requirements where a state illegally derives an exaction under a coercive scheme which penalizes taxpayers for failure to pay their taxes in a timely fashion, thus requiring them to pay first and obtain review of the levies' validity later. *McKesson* held that the state must provide *not* only a fair opportunity to challenge the validity of the tax obligation but also a "clear and certain remedy." 496 U.S. at 19.

On remand, the Florida Supreme court held that *McKesson*'s requirement of a "clear and certain remedy" meant only the existence of a *judicial forum* to *challenge* the validity of the levy. In stating that *Newsweek*, was inapplicable to the instant case the majority opinion stated:

> Specifically, the federal Court held that a taxpayer cannot be cut off from a remedy, or avenue of redress, upon which the taxpayer has reasonably relied. The taxpayer is entitled to proceed upon that avenue and at some point obtain an adjudication – either yea or nay – on the merits of his or her refund claim.

Dryden, 24 Fla. L. Weekly at S48. (App. 4a-5a) Thereafter, it stated:

> Dryden has pursued his claim to completion at every level. He has obtained an adjudication on the merits from three separate tribunals – the trial court, the district court (twice), and this Court. He ultimately lost at each stage – fair and square. The analysis in *Newsweek*, which focuses on a taxpayer's remedy for seeking a refund, is inapplicable to this "merits" case. Simply put: The remedy here is not in issue and never has been.

Dryden, 24 Fla. L. Weekly at S48. (App. 5a-6a)

This holding squarely conflicts with *Newsweek* and *McKesson*. In fact, in both *Newsweek* and *McKesson*, the taxpayer used the judicial avenues available. If this had been all that due process required, the Florida Supreme Court and First District Court of Appeal would not have been reversed. Petitioners submit that *Newsweek*, *McKesson* and due process require a remedy to cure the illegal exaction, not merely a judicial forum to have the exaction declared illegal as the Florida Supreme Court held. In the instant case, the remedy of refunds of illegal

exactions is the only post-deprivation remedy available because the county has already canceled all liens and certificates sold on property of persons who refused to pay. In *McKesson*, this Court stated:

> Our precedents establish that if a State penalizes taxpayers for failure to remit their taxes in timely fashion, thus requiring them to pay first and obtain review of the tax's validity later in a refund action, the Due Process Clause requires the State to afford taxpayers a meaningful opportunity to secure postpayment relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional.

McKesson, 496 U.S. at 22.

Since its decision in *McKesson*, this Court has repeatedly adhered to that decision and held that due process requires meaningful backward-looking relief if no predeprivation remedy exists. *See Fulton County v. Faulkner*, 116 S.Ct. 848 (1996); *National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 115 S.Ct. 2351 (1995); *Reynoldsville Casket Co. v. Hyde*, 115 S.Ct. 1745 (1995); *Reich v. Collins*, 573 U.S. 106 (1994); *Harper; Chemical Waste Man., Inc. v. Hunt*, 504 U.S. 334 (1992); *James B. Beam Distilling; Dennis v. Higgins*, 498 U.S. 439 (1991).

In *Newsweek, Inc. v. Florida Department of Revenue*, 689 So.2d 361 (Fla. 1st DCA 1997), the First District Court of Appeal of Florida had attempted to avoid ordering a sales tax refund, although acknowledging *McKesson's* requirements of "meaningful backward looking relief" when a taxpayer is forced to pay a tax before having an opportunity to challenge it, on the basis that there was a predeprivation remedy provided in section 72.011, Florida Statutes (1997). Even though there was a specific statute authorizing refunds, the Florida District Court held that

McKesson and the cases cited therein did not require a post-payment refund. In its reasoning, the Florida District Court stated:

> Below the Department contended that *McKesson* is distinguishable because, while the liquor taxes at issue in *McKesson* were not encompassed within the procedures for pre-deprivation relief in chapter 72 of the Florida Statutes, the sales tax paid by Newsweek could properly have been contested in a pre-deprivation proceeding pursuant to section 72.011. *We agree that McKesson is distinguishable because that holding was expressly predicated upon the fact that the taxpayer had no meaningful pre-deprivation remedy.* The court's holding was that states are obligated to provide a meaningful opportunity to secure postpayment relief when the state penalizes the taxpayer for failing to pay first and obtain review of the tax's validity later in a refund action.

Newsweek, 689 So.2d at 363 (emphasis added).

This Court rejected this attempted circumvention citing *McKesson* and, among other cases, its decision in *Reich*. This Court held that a state may not bait and switch by holding out what appears to be a post-deprivation refund remedy and then declare, only after the disputed taxes were paid, that no such remedy exists because the taxpayer failed to use an available statutory pre-deprivation mechanism. This Court held that Newsweek "is entitled to a clear and certain remedy and thus it can use the refund procedures to adjudicate the merits of its claim." *Newsweek*, 118 S.Ct. at 905.

Unlike the situation in *Newsweek*, in the instant case there is no pre-deprivation statutory remedy *at all*. The impositions for which refund had been sought have been

declared illegal, null, and void. They were collected pursuant to a statutory scheme which coerces prompt payment to prevent liens from attaching to the property and which provides for summary collection procedures including forfeiture of property. No specific statutory post-deprivation relief mechanism such as refunds exists either. The four-year statute of limitations found in sections 95.11(3)(m) and (p), would control suits for refund in this case and this suit is timely.

Here, as in *McKesson*, Florida has established various financial sanctions and summary remedies by which counties coerce property owners to timely pay the assessments levied and penalizes them for failure to remit timely. The assessments are treated identical to ad valorem taxes insofar as collection is concerned. *See* § 197.3632, Fla. Stat. (1997). A lien attaches as of January 1 of the year levied, and the assessments become due and payable on November 1. They are deemed delinquent if not paid by April 1. *See* §§ 197.122, 197.172, Fla. Stat. (1997). Thereafter, all unpaid taxes bear interest at 18 percent. § 197.172, Fla. Stat. (1997). Nonpayment results in the sale of tax assessment certificates and, ultimately, a tax deed by which the property owner is divested of his property. *See* § 197.3632(8)(a), Fla. Stat. (1997). However, unlike ad valorem taxes, no statutory pre-deprivation remedy exists for challenging assessments. Section 194.171, Florida Statutes (1997), only provides pre-deprivation remedies for challenging ad valorem taxes. Florida also provides a four-year period for refunds for ad valorem taxes assessed on the county tax rolls. *See* § 197.182, Fla. Stat. (1997). A similar statute exists for any state levied tax, license, or account due. *See* § 215.26, Fla. Stat. (1997). No similar statutes exist for special assessments/

non-ad valorem assessments. *Zipperer v. City of Fort Myers*, 41 F.3d 619 (11th Cir. 1995). *Zipperer*, a case involving a challenge to non-ad valorem assessments, recognized that Florida fails to provide any pre-deprivation remedy by which property owners may challenge the legality of a non-ad valorem assessment, in holding that no "plain, speedy, and efficient remedy is available in state courts," under the Tax Injunction Act, 28 U.S.C. Section 1341. *Id.* at 622.

In *Newsweek*, the First District Court of Appeal attempted to avoid the remedy of refunds by emphasizing the existence of a statutory pre-deprivation remedy. This Court rejected the district court's attempt to distinguish *McKesson* by again stating that federal due process required a post-deprivation remedy unless the pre-deprivation remedy was clearly and certainly established as the exclusive means by which to challenge an illegal tax or charge.

In the instant case, the Florida Supreme Court's initial decision attempted to distinguish *McKesson* and deny refunds by asserting the existence of equitable considerations. Equitable considerations and prospective relief were rejected in *McKesson*. By vacating *Dryden*, which was based on "equitable considerations," citing *Newsweek*, it certainly is not conceivable that this Court meant that the Florida Supreme Court could enter a new order on remand which effectively reinstates its first decision rendering the assessments void prospectively for those who paid and retroactively for those who did not pay. That is the effect of Florida Supreme Court's second decision on remand. In the case at bar, no pre-deprivation remedy exists and the only remedy that complies with the *McKesson* due process commands is a refund.

The Florida Supreme Court's decision also is in direct conflict with *Ward*. *McKesson* cited and relied on *Ward*, which announced the principle as follows:

> It is a well settled rule that "money got through imposition" may be recovered back; and, as this court has said on several occasions, "the obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation." *Marsh v. Fulton County* 10 Wall. 676, 684; *City of Louisiana v. Wood*, 102 U.S. 294, 298-299; *Chapman v. County of Douglas*, 107 U.S. 348, 355. *To say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law.* Of course this would be in contravention of the Fourteenth Amendment, which binds the county as an agency of the State.

Ward, 253 U.S. at 24 (emphasis added).

The initial decision in *Dryden* vacated by this Court, held that this Court's pronouncements in *McKesson* did not apply because the county acted in "good faith" based on "equitable considerations." By vacating the Florida Supreme Court's decision and citing *Newsweek*, petitioners submit that this Court has rejected any suggestion that a determination of "good faith" or "equitable considerations", can justify avoiding *McKesson's* directive or that circumvention, as attempted in *Newsweek*, is acceptable.

As the dissents point out in both *Dryden* decisions, it is not an accurate or true statement to assert that those who paid received a benefit. The petitioners who paid received no more benefit than those who did not pay. Furthermore, no specific house-to-house garbage collection service was furnished by anyone. The levies were simply a way of funding particular parts of the county's budget. The ordinances merely changed the funding sources from ad valorem taxes and fees to assessments and fees. No different "benefit" or new facility or source was created for anyone and no specific service or benefit was provided to anyone. The only difference is that those who did not pay had all assessments and liens cancelled while those who did pay were not given the same relief by way of refund.

The majority decision wholly ignores the import of this Court's order vacating its prior decision. Thus, this Court is requested to grant the petition for certiorari review.[2]

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[2] Presently pending in this Court on Petition for Writ of Certiorari from the Florida First District Court of Appeal is *Sharper Image Corp. v. Department of Revenue*, 704 So.2d 657 (Fla. 1st DCA 1997), which also involves refunds and *McKesson* principles.

II. The Florida Supreme Court's decision on remand results in prospective only application of judicial decisions, and violates petitioners' rights secured by the Fourteenth Amendment of the United States Constitution, in conflict with *Newsweek, Inc. v. Department of Revenue*, 118 S.Ct. 904 (1998), *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 498 U.S. 18 (1990), *Reynoldsville Casket Co. v. Hyde*, 115 S.Ct. 1745 (1995), *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993), *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), *Griffith v. Kentucky*, 479 U.S. 314 (1987), *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), and *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971).

In the initial *Dryden* decision, the Florida Supreme Court held that, based on equitable considerations, the decision could be applied prospectively only as to those taxpayers who had paid the assessments under coercion. The Florida Supreme Court's decision on remand from this Court, in declining to change the result of its prior decision and to apply *McKesson* principles, did not specifically state that its decision was to operate prospectively only for those taxpayers who had paid the assessments. However, that is the precise effect of its decision. Those who did not pay had all assessments forgiven and the county in effect paid their assessments for them by acquiring the assessment certificates which had been sold and paying 18 percent interest thereon. The effect of the Florida Supreme Court's holding on remand is that it is proper for a county to pay the assessments plus 18 percent interest for all persons who did not pay, but provide no relief to those persons who did pay. The Florida Supreme Court again refused to apply *McKesson's* requirement of retroactive relief, and held that *Newsweek* was not applicable and that the *only* remedy necessary

was the existence of a judicial forum in which the aggrieved taxpayers could try their claims. This conflicts with *McKesson* and *Newsweek*.

Notwithstanding the form of its order or the language used therein, the effect of the Florida Supreme Court's second decision in *Dryden* is that it operates prospectively for all taxpayers who paid the assessments and retroactively for all those who did not pay. Approximately one-half of the property owners in Madison County refused to pay the assessments and suffered liens being attached to their property, which resulted in interest rates and certificates being sold for nonpayment. All of these liens were canceled by Madison County by repurchase of the certificates, including the payment of 18 percent interest thereon. This constitutes selective prospectivity and violates the principles of equal treatment as required by *Hyde, Harper, Griffith,* and *James B. Beam Distilling*.

James B. Beam Distilling, cited in *Harper,* discusses *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971), and *Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263 (1984), both of which also address prospective verses retroactive decisional application. In addressing the *Chevron Oil* decision, Justice Souter criticized and rejected prospectivity because it precludes retroactive application of a new rule to some litigants when it is not applied to others, citing the *Griffith* equality principle.

James B. Beam Distilling arose in the wake of this Court's decision in *Bacchus,* which held a Hawaii statute invalid because it discriminated between imported and local alcoholic products. The Georgia Supreme Court had refused to order refunds and declared its decision following *Bacchus* prospective only because there had existed a

Georgia judicial decision upon which the litigants could have justifiably relied. The question before this Court was whether the Georgia Supreme Court decision could be applied prospectively only. This Court stated:

> *Griffith* cannot be confined to the criminal law. Its equality principle, that similarly situated litigants should be treated the same, carries comparable force in the civil context. See *Estate of Donnelly*, 397 U.S., at 296 (Harlan, J., concurring). Its strength is in fact greater in the latter sphere. With respect to retroactivity in criminal cases, there remains even now the disparate treatment of those cases that come to the Court directly and those that come here in collateral proceedings. See *Griffith, supra*, at 331-332 (WHITE, J., dissenting). Whereas *Griffith* held that new rules must apply retroactively to all criminal cases pending on direct review, we have since concluded that new rules will not relate back to convictions challenged on habeas corpus. *Teague v. Lane*, 489 U.S. 288 (1989). No such difficulty exists in the civil arena, in which there is little opportunity for collateral attack of final judgments.

James B. Beam Distilling, 501 U.S. at 540. Thereafter this Court observed that constitutional thresholds existed in any inquiry into prospective verses retroactive application citing *McKesson*.

Harper was followed in *Hyde*. *Hyde* attempted to rely on an Ohio statute which tolled the statute of limitation in lawsuits involving out-of-state defendants. While the case was pending, this Court held the Ohio tolling statute invalid in *Bendix Autolite Corp. v. Midwesco Enterprises, inc.*, 486 U.S. 888 (1988). This Court rejected *Hyde's* contention that the *Bendix Autolite* decision should not be retroactively applied and reversed the Ohio Supreme

Court's decision stating: "That court's refusal to dismiss her suit on the ground that she may have reasonably relied upon pre-*Bendix* law is the very sort of justification that this Court, in *Harper*, found insufficient to deny retroactive application of a new legal rule." *Hyde*, 115 S.Ct. at 1747.

Hyde had attempted to avoid *Harper* consequences by characterizing the Ohio Supreme Court's holding as relating to the remedy. This Court rejected this contention pointing out that:

> Regardless, we do not see how, in the circumstances before us, the Ohio Supreme Court could change a legal outcome that federal law, applicable under the Supremacy Clause, would otherwise dictate simply by calling its refusal to apply that federal law an effort to create a remedy. The Ohio Supreme Court's justification for refusing to dismiss Hyde's suit is that she, and others like her, may have reasonably relied upon pre-*Bendix* law – a reliance of the same kind and degree as that involved in *Chevron Oil*. But, this type of justification – often present when prior law is overruled – is the very sort that this Court, in *Harper*, found insufficient to deny retroactive application of a new legal rules (that had been applied in the case that first announced it). If *Harper* has anything more than symbolic significance, how could virtually identical reliance, without more, prove sufficient to permit a virtually identical denial simply because it is characterized as a denial based on "remedy" rather than "non-retroactivity"?

Hyde, 115 S.Ct. at 1749.

Here, the Florida Supreme Court in its second *Dryden* decision has held that, since Florida provided a judicial forum for adjudication of petitioners' claims, this was all

the "remedy" required by *McKesson*. This holding is inconsistent with *Hyde*, *Harper*, *James B. Beam Distilling*, and *Griffith*, and the cases cited therein.

CONCLUSION

Based on the foregoing reasons and authorities cited, the petition for writ of certiorari should be granted.

Respectfully submitted,

LARRY E. LEVY
Fla. Bar No. 047019
LOREN E. LEVY
Fla. Bar No. 0814441
THE LEVY LAW FIRM
1828 Riggins Road
Tallahassee, Florida 32308
850/219-0220

Counsel for Petitioners

Supreme Court of Florida

QUINTON DRYDEN et al.,
Petitioners,

vs.

STATE OF FLORIDA,
Respondent.

No. 87,594

[January 21, 1999]

SHAW, J.

This case is before the Court on remand from the United States Supreme Court for reconsideration of our decision in *Dryden v. Madison County*, 696 So. 2d 728 (Fla. 1997), *vacated*, 118 S. Ct. 1162 (1998). We reaffirm our decision in *Dryden*.

1. Facts

The facts are set out fully in this Court's initial opinion on review. *See Dryden v. Madison County*, 696 So. 2d 728 (Fla. 1997). Madison County in 1989 adopted several ordinances levying special assessments on property located in the county to pay for garbage services, landfill closure, ambulance service, and fire protection. Several years later, the assessments were declared invalid, and Dryden and other residents sought refunds. The trial court found that the county had acted in good faith in levying the 1989 and 1990 assessments and that Dryden was unentitled to a refund for those years. The district court affirmed. We approved the district court decision:

> Where an invalid tax scheme discriminates among citizens without a legal basis and bestows no commensurate benefit, a refund may be in order. *Department of Revenue v. Kuhnlein*, 646 So. 2d 717 (Fla. 1994). Otherwise, the tax could constitute an unlawful taking of property in violation of state and federal rights. *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990). Where an invalid tax scheme applies across the board and confers a commensurate benefit, on the other hand, "equitable considerations" may preclude a refund. *Gulesian v. Dade County School Board*, 281 So. 2d 325 (Fla. 1973).
>
> In the present case, the 1989 and 1990 assessments fall in the latter category. The assessments were non-discriminatory (i.e., they applied across the board to all property owners in the county) and they conferred a commensurate benefit (i.e., they provided for garbage collection and disposal, landfill closure, ambulance service, and fire protection). Further, the county acted in good faith in imposing these assessments. Competent substantial evidence supports the denial of refunds for 1989 and 1990.

Dryden, 696 So. 2d 729-30 (footnotes omitted).

The United States Supreme Court subsequently vacated our decision in *Dryden* in light of its just-released opinion in *Newsweek, Inc. v. Florida Dep't of Revenue*, 118 S. Ct. 904 (1998). The decision vacating *Dryden* was brief and without analysis:

> On petition for writ of certiorari to the Supreme Court of Florida. Petition for writ of certiorari granted. Judgment is vacated and the

> case is remanded to the Supreme Court of Florida for further consideration in light of *Newsweek, Inc. v. Florida Department of Revenue*, 522 U.S. ___, 118 S. Ct. 904, 139 L. Ed. 2d 888 (1998).

Dryden v. Madison County, 118 S. Ct. 1162 (1998). This Court ordered briefing by the parties concerning the effect of *Newsweek* on our decision in *Dryden*, and Dryden now contends that *Newsweek* mandates a refund. We disagree.

2. Newsweek v. Florida Dep't of Revenue

Newsweek is a tax "remedy" case. This Court in *Department of Revenue v. Magazine Publishers of America, Inc.*, 565 So. 2d 1304 (1990),[1] declared unconstitutional a statutory scheme that imposed a sales tax on magazines but not newspapers. Relying on this ruling, Newsweek, a magazine, sought a tax refund, claiming that it had been compelled to pay taxes pursuant to the unconstitutional scheme. The trial court did not reach the merits of the claim but rather granted summary judgment against Newsweek. The district court of appeal affirmed. *Newsweek, Inc. v. Department of Revenue*, 689 So. 2d 361 (Fla. 1st DCA 1997). The district court reasoned that Newsweek should have availed itself of the *prepayment* remedy under section 72.011, Florida Statutes (1987), which allowed a taxpayer to file suit and pay the contested

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[1] This decision was subsequently vacated and remanded and then reaffirmed. *See Department of Revenue v. Magazine Publishers of America, Inc.*, 565 So. 2d 1304 (1990), *vacated sub nom., Miami Herald Publ'g Co. v. Department of Revenue*, 499 U.S. 972 (1991), *reaffirmed*, 604 So. 2d 459 (Fla. 1992).

amount into the court registry rather than to the government. 689 So. 2d at 363-64.

The United States Supreme Court granted certiorari and vacated the district court decision, pointing out that a different statutory provision, section 215.26, Florida Statutes (1987), authorized a *postpayment* remedy wherein the taxpayer could pay the tax first and file suit later. The federal Court reasoned:

> The effect of the District Court of Appeal's decision below, however, was to cut off Newsweek's recourse to § 215.26. While Florida may be free to require taxpayers to litigate first and pay later, due process prevents it from applying this requirement to taxpayers, like Newsweek, who reasonably relied on the apparent availability of a postpayment refund when paying the tax.

Newsweek, 118 S. Ct. at 905. The federal Court concluded that Newsweek was entitled to proceed via the postpayment route and obtain an adjudication on the merits of its refund claim: "Newsweek is entitled to a clear and certain remedy and thus it can use the refund procedures [in section 215.26] to adjudicate the merits of its claim." *Id.* at 905.

3. Application to Present Case

Newsweek is inapplicable to the present case. The United States Supreme Court in *Newsweek* never reached the merits of the refund issue but rather focused only on the remedy that must be made available to a taxpayer seeking an adjudication on the merits of a refund claim. Specifically, the federal Court held that a taxpayer cannot

be cut off from a remedy, or avenue of redress, upon which the taxpayer has reasonably relied. The taxpayer is entitled to proceed upon that avenue and at some point obtain an adjudication – either yea or nay – on the merits of his or her refund claim.

Until the United States Supreme Court stepped in, Newsweek had never obtained an adjudication on the merits of its refund claim. (As noted above, the trial court had granted summary judgment against Newsweek, and the district court had said that Newsweek was not entitled to seek a refund because Newsweek had failed to comply with the statutory prepayment requirements.) The United States Supreme Court vacated the district court judgment and held that Newsweek was entitled to proceed via the postpayment route and obtain an adjudication on the merits.

The present refund case could not be more different – it is not a tax "remedy" case. In fact, the remedy that Dryden has chosen has never been in issue in these proceedings. Dryden has proceeded via the postpayment route (i.e., he paid the assessments first and then filed suit), and – unlike the situation in *Newsweek* – the government has not asserted and the courts have not held that he is unentitled to do so. Rather, the parties and courts have viewed the availability of the postpayment remedy as a "given" in this case and have focused exclusively on the merits of Dryden's refund claim (i.e., on whether Dryden and other taxpayers are in fact due a refund). This case thus begins precisely where *Newsweek* left off.

Dryden has pursued his claim to completion at every level. He has obtained an adjudication on the merits from

three separate tribunals – the trial court, the district court (twice), and this Court. He ultimately lost at each stage – fair and square.[2] The analysis in *Newsweek*, which focuses on a taxpayer's remedy for seeking a refund, is inapplicable to this "merits" case. Simply put: The remedy here is not in issue and never has been.

Based on the foregoing we reaffirm our decision in *Dryden v. Madison County*, 696 So. 2d 728 (Fla. 1997), in its entirety.

It is so ordered.

HARDING, C.J., ANSTEAD, J., and KOGAN, Senior Justice, concur.

WELLS, J., dissents with an opinion, in which PARIENTE, J., and OVERTON, Senior Justice, concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

WELLS, J., dissenting.

I dissent because the majority errs in concluding that the United States Supreme Court's vacation of this Court's judgment in this cause and remand to us for

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[2] As noted above, this Court in *Dryden* held that although the special assessments were levied pursuant to a technically invalid ordinance, Dryden was not entitled to a refund for good reason: (1) the assessments were nondiscriminatory, i.e., they applied across the board to all property owners; (2) the assessments conferred a commensurate benefit on the taxpayers, i.e., in return for the assessments, the taxpayers were provided with garbage collection and disposal, landfill closure, ambulance service, and fire protection; and (3) the assessments were enacted in good faith.

further consideration in light of *Newsweek, Inc. v. Florida Department of Revenue,* 118 S. Ct. 904 (1998), should have no impact upon our decision in this case.

My reading of the *Newsweek* decision finds two clear statements by the United States Supreme Court which, when applied to this case, require rescinding the remanded judgment and opinion of this court. In the first statement, the Court noted with approval the Florida First District Court of Appeal's acknowledgment of the requirement of *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco,* 496 U.S. 18 (1990), that there be a " 'meaningful backward-looking relief' when a taxpayer is forced to pay a tax before having an opportunity to establish its unconstitutionality." *Newsweek,* 118 S. Ct. at 904. In the second statement, the Court held that:

> While Florida may be free to require taxpayers to litigate first and pay later, due process prevents it from applying this requirement to taxpayers, like Newsweek, who reasonably relied on the apparent availability of a postpayment refund when paying the tax.
>
> Newsweek is entitled to a clear and certain remedy and thus it can use the refund procedures to adjudicate the merits of its claim.

Newsweek, 118 S. Ct. at 905.

Newsweek reinforces the fact that when the state or a state-authorized taxing unit subjects a taxpayer to an unauthorized payment, *McKesson* requires either (1) a "predeprivation process" authorizing taxpayers to challenge the validity of a payment prior to making the payment, or (2) postpayment "meaningful relief." If no

prepayment procedure exists, as in this case, then postpayment "meaningful relief" must include a refund if the taxpayer has a meritorious claim. It is an inescapable fact that the act of refunding money to the taxpayer is what makes the relief meaningful.

The majority gives the vacation of the judgment an empty meaning by asserting that:

> [This] is not a tax "remedy" case. . . . Dryden has proceeded via the postpayment route. . . . Rather, the parties and courts have viewed the availability of the postpayment remedy as a "given" in this case and have focused exclusively on the merits of Dryden's refund claim (i.e., on whether Dryden and other taxpayers are in fact due a refund). This case thus begins precisely where *Newsweek* left off.

Majority op. at 4.

This *is* a tax remedy case. The fundamental issue before us in this case continues to be the issue framed by the First District when the case was certified to us, which is whether our decision in *Gulesian v. Dade County School Board*, 281 So. 2d 325 (Fla. 1973), is still valid after the Supreme Court's decision in *McKesson*. The issue in both *Gulesian* and *McKesson* was whether taxpayers had remedies available after taxing schemes were found to be invalid.[3] In *Gulesian*, we held that although a refund to

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[3] In *McKesson*, the only reason a refund was not specifically ordered was that the challenged liquor tax was not found to be invalid in its entirety but rather was invalid only insofar as it operated in a manner that discriminated against interstate commerce. Therefore, the Supreme Court allowed either a

taxpayers would be the normal remedy after a tax was invalidated, an exception was warranted under the facts of *Gulesian* and thus the refund remedy was not available in that case. In *McKesson*, the United States Supreme Court held that a postpayment remedy was mandatory in a situation in which no prepayment procedure existed and that remedy had to be a refund or its equivalent. *McKesson* specifically states:

> Had the Florida courts declared the Liquor Tax invalid either because (other than its discriminatory nature) it was beyond the State's power to impose, as was the unapportioned tax in [*Atchison, Topeka & Santa Fe Ry. v. O'Connor*, 223 U.S. 280 (1912)], or because the taxpayers were absolutely immune from the tax, as were the Indian Tribes in [*Ward v. Board of County Commissioners*, 253 U.S. 17 (1920); and *Carpenter v. Shaw*, 280 U.S. 363 (1930)], no corrective action by the State could cure the invalidity of the tax during the contested tax period. *The State would have had no choice but to "undo" the unlawful deprivation by refunding the tax previously paid under duress, because allowing the State to "collect these unlawful taxes by coercive means and not incur any obligation to pay them back . . . would be in contravention of the Fourteenth Amendment."*

McKesson, 496 U.S. at 39 (emphasis added) (quoting *Ward*, 253 U.S. at 24).

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refund or other retroactive relief that would cure the discrimination. *McKesson*, 496 U.S. at 51. In this case, the assessments were held to be null and void based on the county's failure to substantially comply with the statutory authority under which it purported to act. *See Madison County v. Foxx*, 636 So. 2d 39, 48 (Fla. 1st DCA 1994).

The Supreme Court made this patent in *McKesson* by citing to its earlier decision regarding a tax on certain Indian tribe lands in *Ward v. Board of County Commissioners*, 253 U.S. 17 (1920):

> We explained the State's duty to remit the tax as follows:
>
> > "To say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law. Of course this would be in contravention of the Fourteenth Amendment, which binds the county as an agency of the State."

McKesson, 496 U.S. at 33-34 (quoting *Ward*, 253 U.S. at 24). Applying this rule to the remand of this case requires the conclusion that not only is this a tax remedy case but that the tax remedy must include a refund.

The United States Supreme Court asks us to reconsider this case in light of *Newsweek*, which reiterates the *McKesson* due-process requirement that a taxpayer who has only the availability of a postpayment refund, as did Dryden, should receive the "clear and certain remedy" of "meaningful backward-looking relief." In *McKesson*, the Supreme Court expressly rejected equitable exceptions to the refund requirement. *McKesson* at 46-47. In *Newsweek*, the Court did not mention any good-faith equitable exception. This substantiates my serious reservations as to the continued vitality of *Gulesian* under any circumstances. I believe the correct answer to the First District's

certified question is that the *Gulesian* exception is not still valid. However, even though the question certified to us by the First District is as to the continued viability of the *Gulesian* exception after the *McKesson* decision, we do not have to reach that issue to decide whether refunds are required in this case. Rather, I believe the following from my dissent in this case could be adopted:

> Moreover, although neither *McKesson II* nor *Kuhnlein* specifically overruled *Gulesian*, the continuing vitality of *Gulesian* in light of these decisions is questionable. Nevertheless, even if *Gulesian* is still good law, I do not believe the very limited exception afforded by *Gulesian* to be applicable here. The evidence in this case does not establish that the County acted within the "good faith" parameters of *Gulesian*. In *Gulesian*, this Court upheld a trial court's ruling that equitable considerations precluded refunds of taxes based on a presumptively valid statute which was later ruled unconstitutional. The Court gave two reasons for its decision: ordering a refund in the small amounts that would be required would impose an intolerable burden on the school board; and the school board acted in good faith in relying on a presumptively valid statute and to impose a refund would compound the school board's fiscal problems. However, the particularly persuasive fact was that the taxing authority relied upon a presumptively valid statute which had been so held by a trial court but later reversed by the appellate court. This point was recognized in *Coe v. Broward County*, 358 So. 2d 214, 215-16 (Fla. 4th DCA 1978), in which the court noted that *Gulesian* had carved out a very narrow exception to the taxpayer's right to a refund and that good

> faith was clearly evident in *Gulesian* because the school board acted at all times in accordance with the law as then interpreted by the courts and enacted by the legislature.
>
> Unlike the taxing authority in *Gulesian*, the County did not act in reliance on a state statute caught up in a reversed court interpretation as to its constitutionality. Rather, the County failed to comply with the precise statute it relied upon in enacting its ordinances. Although the County drafted its ordinances and levied assessments based upon advice from various sources, a government with the power to exact property from its citizens clearly should be held to a standard that it will know and follow the law. Perhaps those who gave the County the erroneous advice concerning the adoption of the ordinances should have the ultimate responsibility, but those who paid under the threat of the County's power to exact the payment should not be held to have no recourse against the unlawful exaction.
>
> The facts presented in this case are simply so different from what occurred in *Gulesian* that it is erroneous to apply the good-faith exception of *Gulesian*. *See McKesson II*, 496 U.S. at 46-47 (state's reliance on statute similar to one found unconstitutional several years earlier precluded state's reliance on an equitable justification to avoid affording relief).

Dryden v. Madison County, 696 So. 2d at 728, 732-33 (Fla. 1997) (Wells, J., dissenting) (citations and footnote omitted). Since this case is so different factually from *Gulesian*, we could leave to another day the issue of whether a case

resembling *Gulesian* allows for the application of a *Gulesian* exception to "meaningful relief," including a refund.

In this case, however, we plainly are in error if we continue to ignore, as the majority does, just how patently discriminatory and inequitable the refusal to refund the payment is in this case. The Madison County assessments were treated identically to ad valorem taxes insofar as collection was concerned. No prepayment mechanism existed for challenging the assessments. If assessments were not paid, liens attached to the property owners' real property, and upon becoming delinquent, the amount of the liens accrued interest at eighteen percent per annum. Nonpayment resulted in the sale of tax assessment certificates.

Precisely contrary to the majority's assertion in its footnote 2, the assessments did not apply across the board to all property owners in this case. Approximately one-half of the property owners in Madison County did not pay the assessments, and liens attached to their properties. Subsequently, the County canceled the liens by purchasing all assessment certificates sold to third parties for nonpayment. In reality, the property owners who did not pay, and thus failed to comply with the law, never had to pay. On the other hand, the property owners who complied with the law, which was later found to be invalid, were the only property owners who had to pay.

Finally, I point out that Judge Davis, in her concurring opinion in the First District's *Newsweek* decision, cited *Dryden v. Madison County*, 672 So. 2d 840, 843 (Fla. 1st DCA 1996), as a basis for the First District's refusal to

provide a refund to Newsweek. *Newsweek, Inc. v. Department of Revenue*, 689 So. 2d 361, 364 (Fla. 1st DCA 1997) (Davis, J., concurring). Judge Davis pointed to the First District's reasoning in *Dryden* that *Gulesian* equitable considerations were a basis for denying refunds to Dryden and suggested that this same reasoning should support the denial of refunds in *Newsweek*. *Id*. Not only did the United States Supreme Court refuse to accept the *Dryden* analogy as a reason for denying "meaningful postpayment relief" in *Newsweek*, but the Court also vacated our judgment in *Dryden* on the basis of its reversal of the First District's *Newsweek* decision.

PARIENTE, J., and OVERTON, Senior Justice, concur.

Application for Review of the Decision of the District Court of Appeal – Certified Great Public Importance

First District – Case Nos. 95-466
95-978

(Madison County)

Larry E. Levy and Loren E. Levy of the Levy Law Firm, Tallahassee, Florida,

for Petitioner

George T. Reeves and Edwin B. Browning, Jr. of Davis, Browning & Schnitker, P.A., Madison, Florida; and Ken Van Assenderp, Tallahassee, Florida,

for Respondent

Robert A. Butterworth, Attorney General, Joseph C. Mellichamp, III, and Eric J. Taylor, Assistant Attorneys General, Tallahassee, Florida,

for Florida Department of Revenue,
Amicus Curiae

Robert L. Nabors, Virginia Saunders Delegal and Heather J. Melom of Nabors, Giblin, & Nickerson, P.A., Tallahassee, Florida; and Susan H. Churuti, Clearwater, Florida,

for Florida Association of Counties
and Florida Association of County
Attorneys, Amici Curiae

Supreme Court of the United States

No. 97-625

QUINTON DRYDEN, ET AL.,

Petitioners

v.

MADISON COUNTY, FLORIDA

ORDER ALLOWING CERTIORARI. Filed March 2, 1998.

The petition herein for writ of certiorari to the Supreme Court of Florida is granted.

Supreme Court of the United States

No. 97-625

QUINTON DRYDEN, ET AL.,

Petitioners

v.

MADISON COUNTY, FLORIDA

ON WRIT OF CERTIORARI to the Supreme Court of Florida

THIS CAUSE having been submitted on the petition for a writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court is vacated with costs, and the case is remanded to the Supreme Court of Florida for further consideration in

light of *Newsweek, Inc. v. Florida Department of Revenue*, 522 U.S. ___ 1998).

IT IS FURTHER ORDERED that the petitioner Quinton Dryden, et al., recover from Madison County, Florida, Three Hundred Dollars ($300.00) for costs herein expended.

March 2, 1998

Clerk's costs: $300.00

Quinton DRYDEN, et al., Petitioners,

v.

MADISON COUNTY, Florida,
Respondent.

No. 87594.

Supreme Court of Florida.

May 15, 1997.

Rehearing Denied July 9, 1997.

County residents brought action challenging validity of county ordinances which levied special assessments for various services provided by county. Upon remand, 636 So.2d 39, the Circuit Court, Madison County, John Peach, J., granted residents tax refund for two of five contested years. Residents and county appealed. The District Court of Appeal, 672 So.2d 840, affirmed in part, reversed in part and certified question. The Supreme Court, Shaw, J. held that: (1) residents were not entitled to refund of illegal assessments made by county, and (2) county was not required to pay postjudgment interest on refunds.

Question answered and decision approved.

Wells, J., filed dissenting opinion.

Larry E. Levy and Loren E. Levy of the Levy Law Firm, Tallahassee, for Petitioners.

George T. Reeves and Edwin B. Browning, Jr. of Davis, Browning & Schnitker, P.A., Madison; and Ken Van Assenderp, Tallahassee, for Respondent.

Robert A. Butterworth, Attorney General; Joseph C. Mellichamp, III, Senior Assistant Attorney General and Thomas P. Crapps and Eric J. Taylor, Assistant Attorneys General, Tallahassee, for Florida Department of Revenue, Amicus Curiae.

Keith C. Hetrick, Tallahassee; and Robert M. Rhodes and Victoria L. Weber of Steel, Hector & Davis L.L.P., Tallahassee, for Florida Home Builders Association, Amicus Curiae.

Robert L. Nabors and Virginia Saunders Delegal of Nabors, Giblin & Nickerson, P.A., Tallahassee; and Herbert W.A. Thiele, President, Florida Assosciation [sic] of County Attorneys, Inc., Tallahassee, for Florida Association of Counties and Florida Association of County Attorneys, Amici Curiae.

Daniel C. Brown of Katz, Kutter, Haigler, Alderman, Marks, Bryant & Yon, P.A., Tallahassee, for Water Oak Management Corporation and John Richard Sellars, Amici Curiae.

Sanford A. Minkoff, Lake County Attorney, Tavares, for Lake County, Florida, Amicus Curiae.

SHAW, Justice.

We have for review *Dryden v. Madison County*, 672 So.2d 840 (Fla. 1st DCA 1996), wherein the court certified:

> Is the holding of *Gulesian v. Dade County School Bd.*, 281 So.2d 325 (Fla.1973), which provides that under certain circumstances a governmental entity need not refund proceeds from a tax or, in this case, a special assessment that is later determined to be illegal, still valid after the

> decisions of *McKesson v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990), and *Kuhnlein v. Department of Revenue*, 662 So.2d 308 (Fla.1995)[?]

Id. at 844. We have jurisdiction. Art. V, § 3(b)(4), Fla. Const. We answer in the affirmative and approve *Dryden* as explained below.

Madison County in 1989 adopted four ordinances levying special assessments on property located in the county for garbage services, landfill closure, ambulance service, and fire protection. The validity of the ordinances was challenged in 1990 in two suits – one by Foxx, a resident of the City of Madison, and one by Dryden, a class action on behalf of county residents. The suits, wherein the plaintiffs sought a refund of the 1989 and 1990 assessments, were later consolidated.

The court subsequently granted summary judgment in favor of Dryden and ordered refunds, finding that the ordinances had been adopted without the consent of the city dwellers within the county. While the case was pending on appeal, the plaintiffs in 1992 filed a second suit, seeking refund of 1991, 1992, and 1993 assessments. The parties agreed that the district court decision in the first suit would be binding in both cases. The district court ultimately ruled that 1) the ordinances were invalid, and 2) a refund on motion for summary judgment was premature since factual and legal issues remained. *Madison County v. Foxx*, 636 So.2d 39 (Fla. 1st DCA 1994).

On remand, the trial court found that the county had acted in good faith in levying the 1989 and 1990 assessments, but not the 1991, 1992, and 1993 assessments. The

court ruled that Dryden was not entitled to refunds for 1989 and 1990, but was entitled to refunds for 1991, 1992, and 1993, with interest accruing on the date the assessments were paid. The district court affirmed on the refund issue but reversed on the interest issue, concluding that no final money judgment had been entered on the refunds.

Dryden contends that the district court erred in finding him unentitled to refunds for 1989 and 1990. (The county does not contest the refunds for 1991, 1992, and 1993.) Dryden asserts that the court relied on outdated precedent. We disagree.

Where an invalid tax scheme discriminates among citizens without a legal basis and bestows no commensurate benefit, a refund may be in order. *Department of Revenue v. Kuhnlein*, 646 So.2d 717 (Fla. 1994).[1] Otherwise, the tax could constitute an unlawful taking of property in violation of state and federal rights. *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990).[2] Where an invalid tax

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[1] This Court held that a refund was required where the Florida Legislature imposed an unlawful $295 impact fee on cars purchased in other states and then registered in Florida by Florida residents. *Department of Revenue v. Kuhnlein*, 646 So.2d 717 (Fla.1994).

[2] The United States Supreme Court ruled that a refund may be in order where a Florida liquor excise tax gave improper tax breaks for liquor made from products commonly grown in Florida. *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990).

scheme applies across the board and confers a commensurate benefit, on the other hand, "equitable considerations" may preclude a refund. *Gulesian v. Dade County School Bd.*, 281 So.2d 325 (Fla.1973).[3]

In the present case, the 1989 and 1990 assessments fall in the latter category. The assessments were nondiscriminatory (i.e., they applied across the board to all property owners in the county) and they conferred a commensurate benefit (i.e., they provided for garbage collection and disposal, landfill closure, ambulance service, and fire protection). Further, the county acted in good faith in imposing these assessments.[4] Competent substantial evidence supports the denial of refunds for 1989 and 1990.

Dryden also claims that the county should be required to pay interest on the 1991, 1992, and 1993 refunds. We disagree. The amount owed in this class action is still indeterminate and no final money judgment has been rendered. We recently addressed this issue:

> The issue in this case is whether those individuals who are due a refund are entitled to

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[3] This Court held that "equitable considerations" precluded refund of an unlawful .82 mill excess where the school board acted in good faith, where individual refunds to 350,000 taxpayers would be nominal, and where the burden on the school board would be "intolerable". *Gulesian v. Dade County School Bd.*, 281 So.2d 325 (Fla.1973).

[4] We agree with the district court that the record supports the trial court's finding of good faith. *See Dryden*, 672 So.2d at 843 ("We find that there was substantial competent evidence to support the trial court's conclusion that the county acted in good faith in enacting the 1989 and 1990 ordinances. . . . ").

> prejudgment and postjudgment interest. We answer the question in respect to prejudgment interest in the negative, finding that there is no entitlement to prejudgment interest in this action to recover a tax refund. We answer the question in respect to postjudgment interest by determining that there is not a final money judgment, and therefore there is not at present an entitlement to postjudgment interest in this case under these circumstances.

Kuhnlein v. Department of Revenue, 662 So.2d 308, 308 (Fla.1995) (citations omitted). Under the facts of this case, Dryden is not presently entitled to postjudgment interest.

We answer the certified question in the affirmative and approve the decision in *Dryden* as explained herein.

It is so ordered.

KOGAN, C.J., and OVERTON, GRIMES, HARDING and ANSTEAD, JJ., concur.

WELLS, J., dissents with an opinion.

WELLS, Justice, dissenting.

I dissent from the majority's holding that equitable considerations preclude a refund of unlawful assessments. Precluding any remedy to those taxpayers who complied with the law and paid the invalid special assessments constitutes a denial of due process. Moreover, the majority's reliance on *Gulesian v. Dade County School Board*, 281 So.2d 325 (Fla.1973), is misplaced. Even if *Gulesian* is still valid after *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990) (*McKesson II*), this case does not come within the narrow holding of *Gulesian*. To deny the

taxpayers who paid the assessments any relief would additionally violate equal protection and is patently unfair.

I also dissent from the holding that the trial court erroneously ordered postjudgment interest in this case. Because Madison County (the County) entered into a stipulation under which it agreed to refund money obtained through the improper special assessments in the years 1991, 1992, and 1993, it is inequitable not to provide the property owners postjudgment interest here. Accordingly, I would quash the district court's opinion.

The Fourteenth Amendment provides that a state may not deprive any person of property without due process of law. *See* U.S. Const. amend. XIV, § 1. The United States Supreme Court interpreted this amendment in *McKesson II*, in which it set forth the legal analysis appropriate for determining a state's constitutional duty to provide relief to property owners for the payment of unlawful assessments. In *McKesson II*, the Court reviewed our decision in *Division of Alcoholic Beverages & Tobacco v. McKesson Corp.*, 524 So.2d 1000 (Fla.1988) (*McKesson I*), in which we denied a refund of taxes paid under a statute found to violate the Commerce Clause. We cited *Gulesian* in support of our finding that the prospective nature of the rulings was proper in light of the equitable considerations, including the good-faith reliance on a presumptively valid statute and the possibility that any refund would result in a windfall to those who paid the tax. *Id.* at 1010.

In *McKesson II*, the United States Supreme Court reversed our decision. In so doing, the Court stated that

prospective relief by itself did not exhaust the requirements of federal law. *McKesson II*, 496 U.S. at 31, 110 S.Ct. at 2247. The Court explicitly rejected the position that equitable considerations of good-faith reliance by the Division of Alcoholic Beverages and Tobacco on a presumptively valid statute allowed the state to deny a refund. *Id.* at 44, 110 S.Ct. at 2254. Addressing the contention underlying this position, that a requirement that a state provide a refund for what is later determined to be an unconstitutional tax would frustrate the state's ability to engage in sound financial planning, the Court found:

> A State's freedom to impose various procedural requirements on actions for postdeprivation relief sufficiently meets this concern with respect to future cases. The State might, for example, provide by statute that refunds will be available only to those taxpayers paying under protest or providing some other timely notice of complaint; execute any refunds on a reasonable installment basis; enforce relatively short statutes of limitations applicable to such actions; refrain from collecting taxes pursuant to a scheme that has been declared invalid by a court or other competent tribunal pending further review of such declaration on appeal; and/or place challenged tax payments into an escrow account or employ other accounting devices such that the State can predict with greater accuracy the availability of undisputed treasury funds. The State's ability in the future to invoke such procedural protections suffices to secure the State's interest in stable fiscal planning when weighed against its constitutional obligation to provide relief for an unlawful tax.

See McKesson II, 496 U.S. at 45, 110 S.Ct. at 2254-55 (footnote omitted). The Court went on to note that if the state's reliance on a presumptively valid statute was a relevant consideration to its obligation to provide relief for its unconstitutional deprivation of property, such good faith was not present in this case. *Id.* at 46-47, 110 S.Ct. at 2255-56.

Recently, we considered the significance of *McKesson II* within the context of the challenge to the motor vehicle impact fee. *See Department of Revenue v. Kuhnlein*, 646 So.2d 717 (Fla.1994). In *Kuhnlein*, we acknowledged that under *McKesson II*, the State could be entitled to fashion a retroactive remedy in cases involving an improperly levied fee and courts should give the legislature the opportunity to fashion a retroactive remedy within a reasonable period of time. *Id.* at 727 (on motion for clarification). However, we noted that because the retroactive remedy in that case would be highly imperfect and would involve delays that would result in fundamental injustice, the trial court did not abuse its discretion in ordering a refund. *Id.*

After *McKesson II* and *Kuhnlein*, it is clear that if a state places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the state to provide meaningful backward-looking relief to rectify any unconstitutional deprivation. *See McKesson II*, 496 U.S. at 31, 110 S.Ct. at 2247. Although *McKesson II* and *Kuhnlein* involved federal constitutional issues founded on the Commerce Clause, the rationale for refunding the unlawful tax in those cases is applicable to

this case. Exaction of a tax constitutes a deprivation of property, *see McKesson II*, 496 U.S. at 36, 110 S.Ct. at 2250; therefore, federal due process requires the state to provide a clear and certain remedy for the unconstitutional deprivation of tax moneys. It is also not a meaningful distinction that *McKesson II* and *Kuhnlein* involved "taxes" and this case involves a "special assessment." The constitutional principles relevant to each case are the same because whatever the label, a government-imposed exaction of money from a citizen must conform to the law to be in compliance with due process.

The trial court determined that in 1988, the County began researching additional revenue sources. The County determined that the use of special assessments was the best source of revenues, and it hired legal counsel to draft the ordinances. In 1989, the County adopted four ordinances purporting to levy special assessments against property located within the county for garbage collection and disposal, landfill closure, ambulance service, and fire protection.

The validity of the ordinances was challenged by taxpayers asserting that the ordinances were deficient because the County failed to comply with section 125.01(1)(q)(2), Florida Statutes (1989), and demanding refunds of all levies previously paid. In response to the suits, the County enacted new ordinances purporting to amend the 1989 ordinances. However, the 1989 ordinances were found to be invalid for the total failure to comply with section 125.01(1)(q)(2), Florida Statutes (1989). *See Madison County v. Foxx*, 636 So.2d 39, 50 (Fla. 1st DCA 1994). To say that the County could collect these unlawful special assessments by coercive means and not

incur any obligation to remedy this constitutional violation clearly contravenes the Constitution.

Moreover, although neither *McKesson II* nor *Kuhnlein* specifically overruled *Gulesian*, the continuing vitality of *Gulesian* in light of these decisions is questionable. *See McKesson II*, 496 U.S. at 46-47, 110 S.Ct. at 2255-56. Nevertheless, even if *Gulesian* is still good law, I do not believe the very limited exception afforded by *Gulesian* to be applicable here. The evidence in this case does not establish that the County acted within the "good faith" parameters of *Gulesian*. In *Gulesian*, this Court upheld a trial court's ruling that equitable considerations precluded refunds of taxes based on a presumptively valid statute which was later ruled unconstitutional. The Court gave two reasons for its decision: ordering a refund in the small amounts that would be required would impose an intolerable burden on the school board; and the school board acted in good faith in relying on a presumptively valid statute and to impose a refund would compound the school board's fiscal problems. *See id.* at 326. However, the particularly persuasive fact was that the taxing authority relied upon a presumptively valid statute which had been so held by a trial court but later reversed by the appellate court. *Id.* at 327.[5] This point was recognized in *Coe v. Broward County*, 358 So.2d 214, 215-16 (Fla. 4th DCA 1978), in which the court noted that *Gulesian* had carved out a very narrow exception to the taxpayer's right to a refund and that good faith was clearly evident

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[5] *See also State v. Greer*, 88 Fla. 249, 102 So. 739 (1924) (rights acquired under a statute while the statute is duly adjudged to be constitutional are constitutionally protected legal rights).

in *Gulesian* because the school board acted at all times in accordance with the law as then interpreted by the courts and enacted by the legislature.

Unlike the taxing authority in *Gulesian*, the County did not act in reliance on a state statute caught up in a reversed court interpretation as to its constitutionality. Rather, the County failed to comply with the precise statute it relied upon in enacting its ordinances. Although the County drafted its ordinances and levied assessments based upon advice from various sources, a government with the power to exact property from its citizens clearly should be held to a standard that it will know and follow the law. Perhaps those who gave the County the erroneous advice concerning the adoption of the ordinances should have the ultimate responsibility, but those who paid under the threat of the County's power to exact the payment should not be held to have no recourse against the unlawful exaction.

The facts presented in this case are simply so different from what occurred in *Gulesian* that it is erroneous to apply the good-faith exception of *Gulesian*. *See McKesson II*, 496 U.S. at 46-47, 110 S.Ct. at 2255-56 (state's reliance on statute similar to one found unconstitutional several years earlier precluded state's reliance on an equitable justification to avoid affording relief). It is my concern that the majority opinion does not recognize the narrowness of the exception in *Gulesian*. Rather, the majority says that the exception saves an invalid tax scheme which applied across the board and conferred a commensurate benefit. Majority op. at 731-32. This notion is foreign to *Gulesian*.

Last, precluding a refund of unlawful assessments also constitutes a denial of equal protection of the law and is patently unfair. The facts in this case indicate that about one-half of the property owners refused to pay and suffered liens against their property. However, all of the liens were subsequently canceled by the County, resulting in those who simply refused to obey the requirement having to pay nothing. Therefore, county property owners who acted in violation of the law by simply not paying the assessments are having their conduct rewarded by having their liens canceled while residents who complied with the law are unable to receive a commensurate benefit.

In conclusion, I would reverse the trial court's order because I believe this case is controlled by *McKesson II*. The County has an obligation to rectify the invalidity of its deprivation of property by providing retroactive relief for taxpayers who claimed a refund. I do not believe that the ultimate burden of the County's mistake should fall only on those property owners who did what we expect all citizens to do – pay when the government sends the notice to pay.

Additionally, I dissent from the majority's holding that the property owners in this case are not entitled to postjudgment interest for assessments paid on money refunded in 1991, 1992, and 1993. On May 27, 1992, the parties entered into a stipulation under which they agreed that since the issues concerning the assessments assessed for 1991, 1992, and 1993 were similar to and controlled by the resolution of the issues concerning the assessments assessed in 1989 and 1990, the resolution of the later assessments should be held in abeyance pending

resolution of the earlier assessments. In this stipulation, the parties specifically noted:[6]

> If such ordinances are found to be unlawful and a refund ordered all special assessments and/or non-ad valorem assessments collected pursuant thereto shall be held void and refunds shall be made to Plaintiffs and all members of the class paying the same.

The next day, the trial court entered an injunction ordering that the County would ensure that adequate funds would be available to pay any required refund.

In its final order, the trial court found:

> For refunds of assessments for Years 1991, 1992 and 1993 challenged in Case No. 92-173, the Plaintiffs are entitled to refund of those amounts paid after October 31, 1991, together with post judgment interest following the November 25, 1991 Final Judgment pursuant to Section 55.03, Florida Statutes (1993), at the rate of 12 percent, such interest to be computed from the date of payment. *See Palm Beach County vs. Town of Palm Beach,* 579 So.2d 719 (Fla.1991). This is not prejudgment interest as Case No. 92-173 which challenged the assessments for each of those years was held in abeyance by stipulation of the parties recognizing that since the ordinances and assessments and issues raised concerning same were identical in both cases, the outcome in the first case would control the outcome of the second. Thus, this

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[6] At the trial, there was testimony from a county commissioner that the stipulation required a refund with interest if the assessments were found to be unlawful.

> Court's Final Judgment finding the Ordinances and assessments invalid, null and void controls Case No. 92-173. The only issue remaining to be resolved in Case No. 92-173 was the refund issue remanded to this Court and accordingly the cases were consolidated for disposition on remand. The County continued to assess and collect the assessments after this Court's Final Judgment dated November 25, 1991 and now must make refund.

On these facts, the majority's reliance on *Kuhnlein v. Department of Revenue*, 662 So.2d 308 (Fla.1995), is misplaced. In *Kuhnlein*, we found no entitlement to postjudgment interest in the absence of a final money judgment. *Id*. *Kuhnlein* is distinguishable because here the parties by stipulation clearly contemplated that the determination of the 1989 and 1990 assessments would control. Consistent with the stipulation, the trial court ordered the County to pay postjudgment interest to relate back to the date of payment. In light of the conduct of the parties, I would find it inequitable not to allow postjudgment interest as found by the trial court. Accordingly, I respectfully dissent.

Quinton DRYDEN, et al., Appellants,

v.

MADISON COUNTY, Florida, a political subdivision of the State of Florida, and Wes Kelley, in his official capacity as Tax Collector, Madison County, Florida, Appellees.

MADISON COUNTY, Florida, a political subdivision of the State of Florida, and Wes Kelley, in his official capacity as Tax Collector of Madison County, Florida, Appellants,

v.

Quinton DRYDEN, et al., Appellees.

Nos. 95-466, 95-978.

District Court of Appeal of Florida,

First District.

March 5, 1996.

Question Reworded on Limited Grant of Clarification May 7, 1996.

County residents brought action challenging validity of county ordinances which levied special assessments for various services provided by county. After remand, 636 So.2d 39, the Circuit Court, Madison County, John Peach, J., granted residents tax refund for two of five contested years, and residents' appealed and county cross appealed. The District Court of Appeal, Wolf, J., held that: (1) county acted in good faith in adopting special assessment ordinances, so as to make taxes under ordinances unavailable; (2) meaningful postpayment remedies were not constitutionally required; and (3)

award of interest to taxpayers from date of payments of challenged special assessments was illegal prejudgment interest.

Affirmed in part; reversed in part.

An appeal from the Circuit Court for Madison County; John Peach, Judge.

Larry E. Levy of Law Offices of Larry E. Levy, Tallahassee, for appellants/cross appellees.

George T. Reeves and Edwin B. Browning, Jr. of Davis, Browning & Schnitker, P.A., Madison; Ken Van Assenderp, Tallahassee, for appellees/cross appellants.

WOLF, Judge.

Quinton Dryden and other taxpayers (hereinafter taxpayers) appeal from a final order on remand which, among other things, denied a refund of monies paid pursuant to special assessments levied by Madison County (county) in 1989 and 1990. The taxpayers assert on appeal that the trial court erred in finding that the taxpayers are not entitled to a refund of monies paid for years 1989 and 1990 pursuant to levies imposed by ordinances which have been determined to be illegal, null, and void. The county cross appeals and asserts that the trial court erred by awarding interest beginning from the date of the taxpayers' payments of special assessments for the 1991-1993 years thus in effect, awarding unauthorized and prohibited prejudgment interest. We affirm as to the issue on direct appeal, but reverse as to the issue on cross appeal. We also certify a question of great public importance to the supreme court.

In 1989, Madison County adopted four ordinances purporting to levy special assessments against property located within the county for garbage collection and disposal, landfill closure, ambulance service, and fire protection. The validity of the 1989 ordinances was challenged in two suits, which were consolidated – one filed by Wiley Foxx, and a second filed by Quinton Dryden (a class action). In response to the suits, the county passed four new ordinances in 1990, purporting to amend the 1989 ordinances. In June 1990, by amended complaint, the validity of the 1990 ordinances was also attacked.

In the suits, the taxpayers maintained, among other things, that the ordinances were deficient because the county failed to comply with section 125.01(1)(q)2, Florida Statutes (1989), and requested a refund of all levies previously paid. The trial court entered summary judgment in favor of Foxx and Dryden, concluding that all the county ordinances were invalid and null and void because the county had failed to comply with section 125.01(1)(q), and that the charges levied were not special assessments but rather taxes for the general benefit of the county. The trial court also found that the municipalities had not consented as required by statute; therefore, appellees as a class were entitled to a refund of all levies paid. That order was appealed to this court by the county.

While the 1990 case was pending on appeal, another action was filed by the same parties challenging the validity of the assessments levied by Madison County for the years 1991, 1992, and 1993, because assessments for those years were also based on the ordinances challenged in the prior appeal. The parties executed two stipulations. The stipulations provided that the 1992 case would be

held in abeyance with the understanding that the decision of the appellate court would be binding precedent, and further provided that tax certificates would not be issued during the time that the case was being considered and ruled upon by the appellate court. The stipulation also provided,

> c) If such ordinances are found to be unlawful and a refund ordered all special assessments and/or non-ad valorem assessments collected pursuant thereto shall be held void and refunds shall be made to Plaintiffs and all members of the class paying same.

In *Madison County v. Foxx*, 636 So.2d 39 (Fla. 1st DCA 1994), this court found (1) that the 1989 ordinances were invalid for the total failure to comply with section 125.01(1)(q)2, Florida Statutes (1989), the statute expressly named in the ordinance as authority for their adoption; (2) that the question of whether the alleged ordinance constituted special assessments or illegal taxes involved mixed questions of law and fact, therefore, the trial court erred in granting summary judgment; and (3) as to the question of whether the county was required to refund monies collected pursuant to the 1989 ordinances, that

> [u]pon examination of the case law on the subject, *Gulesian v. Dade County School Board*, 281 So.2d 325 (Fla.1973) and *Coe v. Broward County*, 358 So.2d 214 (Fla. 4th DCA 1978), it is our view that many factual and legal issues remain to be considered before deciding the refund issue, and it was inappropriate for the trial court to determine this issue summarily as a matter of law. In addition to the issue of whether the

> County acted in good faith, there remain unanswered questions whether a refund is fiscally possible for Madison County, and whether the cost of processing such refunds would be prohibitive.

Madison County v. Foxx, supra at 50.

On remand, the trial court determined to allow refunds for the years 1991, 1992, and 1993, but decided that because appellee acted "within the good faith parameters of *Gulesian*,"[1] the taxpayers were not entitled to refunds for 1989 and 1990. The trial court specifically found that prior to its finding in November 1991 that the 1989 and 1990 assessments were invalid, the county had acted in good faith based on information obtained from State Association of County Commissioners meetings and "expert" outside counsel who had helped draft the state legislation on special assessments.

The taxpayers' attack on the trial court's determination is essentially two pronged. They first assert that *Gulesian* is inapplicable because unlike the taxing authority in *Gulesian*, the county in this case did not act in reliance on a state statute that was later declared to be invalid, but rather in adopting the ordinance, the county acted in a manner that was directly in conflict with the statute under which it purported to act. Secondly, the taxpayers assert that the case of *Gulesian* has been overruled or modified as a result of the decisions in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990), and *Department*

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[1] *Gulesian v. Dade County School Bd.*, 281 So.2d 325 (Fla.1973).

of Revenue v. Kuhnlein, 646 So.2d 717 (Fla.1994) (*Kuhnlein I*).

In *Gulesian v. Dade School Bd., supra*, the supreme court held that under certain circumstances, such as where the governing entity acted in good faith, it would not be required to refund the proceeds of a tax which is subsequently invalidated. In *Madison County v. Foxx, supra*, this court determined that even though the county had acted inconsistently with state statutes in enacting the ordinances, the case still had to be remanded for a determination of whether the county acted in good faith in passing the assessment. Inherent in this ruling was that under the circumstances of this case, 1) *Gulesian* could be applicable, and 2) the ordinance adoption which was found to be inconsistent with state statute was only one of the factors to be considered in making the factual determination of whether the county acted in good faith.[2] We find that there was substantial competent evidence to

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[2] It would appear that this court's determination that the county could have acted in good faith in enacting the ordinance despite the legislative language was the court's observation that the statutes were unclear: "We have briefly, but by no means exhaustively, outlined the legislative history of the pertinent provisions of section 125.01 to illustrate that this statute, and its legislative history, do not conclusively answer the question of the authority of counties to impose special assessments within municipalities, nor does the body of case law cited by the parties. That experienced lawyers, who have argued cases on the meaning of these statutes and the constitutional provisions for several years – one nearly a quarter of a century ago – argue vehemently such divergent interpretations of these statutes is testament to their confusing message and the need for legislative action." *Madison County v. Foxx, supra* at 48 and 49 (footnote omitted).

support the trial court's conclusion that the county acted in good faith in enacting the 1989 and 1990 ordinances, and decline to disturb the decision of the trial court as to the refund for those years.

We also find that the *McKesson* and *Kuhnlein I* decisions did not overrule the supreme court's holding in *Gulesian*. In *McKesson Corp. v. Division of Alcoholic Beverages, supra*, the supreme court held that if a state requires a citizen to pay a tax prior to challenging the tax, and the tax is later determined to violate the United States Constitution, then the state must provide a meaningful post-payment remedy for taxpayers who made payment pursuant to the unconstitutional taxing scheme. In *Kuhnlein I, supra*, the Florida Supreme Court, citing *McKesson*, determined that the trial court did not err in determining that the appropriate remedy for individuals who were required to pay a tax that violated the Commerce Clause of the United States Constitution was to refund the illegal tax. Neither *Kuhnlein I* nor *McKesson* specifically overruled *Gulesian, supra*.[3]

In addition, in the present case, the tax in question was invalidated for failure to follow statutory procedures, and did not involve a violation of the United States Constitution. In both *McKesson* and *Kuhnlein I*, the taxes were invalidated based on inconsistencies with the United States Constitution. Thus, the requirements of the United States Supreme Court concerning meaningful remedies are inapplicable in this case.

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[3] This court would not have previously remanded this case in *Madison County v. Foxx* for application of the *Gulesian* factors if, in fact, this court felt that *Gulesian* had been overruled.

The county asserts on cross appeal that the trial court erred in awarding interest to the taxpayers from the date of the payments of the special assessments in 1991, 1992, and 1993. They assert that this constituted prejudgment interest in the 1992 lawsuit, because no judgment was entered in the 1992 lawsuit until after the 1990 lawsuit challenging the 1989 and 1990 amendment was resolved on appeal. *See Madison County v. Foxx, supra.*

The trial judge reasoned that the award was

> not prejudgment interest as Case No. 92-173 which challenged the assessments for each of those years was held in abeyance by the stipulation of the parties recognizing that since the ordinance and assessments and issues raised concerning same were identical in both cases, the outcome in the first case would control the outcome of the second case.

We agree with the county that no judgment was entered in the 1992 case, and the award constituted prejudgment interest.

In *Kuhnlein v. Department of Revenue,* 662 So.2d 308 (Fla.1995) (*Kuhnlein II*), the court determined that there was no entitlement to prejudgment interest in a tax refund case, and reaffirmed that postjudgment interest could only run from the time of a final judgment. *Palm Beach County v. Town of Palm Beach,* 579 So.2d 719 (Fla.1991), relied on by the taxpayers, also does not provide for prejudgment interest. In that case, the court held that the party challenging the tax was entitled to postjudgment interest from the date of the entry of the original judgment rather than the amended final judgment.

In the instant case, no final judgment was entered as to the validity of the 1991, 1992, and 1993 assessments. While the parties stipulated that the outcome of the 1990 case would control the subsequent litigation, there was no agreement concerning the date that a judgment as to these taxes would be entered. The stipulation between the parties provided for a refund of the tax monies to the plaintiffs from the years 1991, 1992, and 1993; however, the agreement is silent as to the payment of any interest. Under these circumstances, we determine that the trial court illegally ordered prejudgment interest. We, therefore, reverse that portion of the final judgment and order that the award of prejudgment interest be stricken. In all other respects the judgment is affirmed.

We do, however, recognize that there is some question concerning the continuing vitality of the *Gulesian* decision in light of the *McKesson* and *Kuhnlein I* decisions. We, therefore, certify the following question to the supreme court as being one of great public importance:

> IS THE HOLDING OF *GULESIAN V. DADE COUNTY SCHOOL BD.*, 281 So.2d 325 (Fla.1973), WHICH PROVIDES THAT UNDER CERTAIN CIRCUMSTANCES A GOVERNMENTAL ENTITY NEED NOT REFUND PROCEEDS FROM A TAX OR, IN THIS CASE, A SPECIAL ASSESSMENT THAT IS LATER DETERMINED TO BE ILLEGAL, STILL VALID AFTER THE DECISIONS OF *MCKESSON V. DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO*, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990), AND *KUHNLEIN V. DEPARTMENT OF REVENUE*, 662 So.2d 308 (Fla.1995).

JOANOS and VAN NORTWICK, JJ., concur.

IN THE CIRCUIT COURT, THIRD JUDICIAL CIRCUIT, IN AND FOR MADISON COUNTY, FLORIDA.

WILEY D. FOXX,

Plaintiff,

vs.

MADISON COUNTY, a political subdivision of the State of Florida, and WES KELLY, as the Tax Collector for Madison County, Florida,

Defendants.

CASE NO. 90-161-CA

and

QUINTON DRYDEN, et al.,

Plaintiffs,

vs.

MADISON COUNTY, a political subdivision of the State of Florida, and WES KELLY, as the Tax Collector for Madison County, Florida,

Defendants.

CASE NOS. 90-198-CA 92-173-CA

(Filed Feb. 2, 1995)

_____/

ORDER ON REMAND

THIS CAUSE came on to be heard on December 21, 1994, after due notice, on remand from the First District Court of Appeal. After remand Case No. 92-173, which was filed while case No. 90-198 was pending on appeal in the First District Court of Appeal, was consolidated with

Case No. 90-198 without objection. Case No. 92-173 includes the same parties, ordinances, and issues as Case No. 90-198, and the complaint, amended complaint, and second amended complaint filed therein challenge the validity of the assessments levied by Madison County for years 1991, 1992, and 1993, which such assessments were levied pursuant to Ordinances 89-26, 89-27, 89-28 and 89-29 and 1990 Ordinances 33, 34, 35 and 36 which were the same ordinances involved in Case No. 90-198. Case No. 92-173 was held in abeyance pending the outcome of Case No. 90-198, which was pending on appeal.

Wiley D. Foxx v Madison County, Case No. 90-161 was consolidated with Case No. 90-198 in 1990 in this court and remained consolidated on appeal. Hearing on remand of the *Foxx* case in Count III of his amended complaint has been continued until a later date by agreement of the parties and is not addressed by this order.

In this Court's final judgment dated November 25, 1991, invalidating the ordinances and finding void the charges labeled "special assessments/non-ad valorem assessments" levied pursuant thereto, this Court ordered that all funds collected by Madison County for years 1989 and 1990 pursuant to said ordinances be refunded to the named Plaintiff's Dryden, et al., and all class members. The District Court vacated that part of this Court's final judgment dealing with refunds, finding same to be premature and remanded the refund question for further hearing in which the refund issue can be considered and decided by the Court after presentation of evidence and testimony by the parties.

In its opinion filed February 9, 1994, the district Court directed that, in considering the Plaintiffs' right to refund, this Court should give due consideration to *Coe vs. Broward County,* 358 So2d 214 (Fla. 4th DCA 1978), and *Gulesian vs. Dade County,* 281 So.2d 325 (Fla. 1973), and the statements and analyses contained therein. Consideration also was directed to be given to the fiscal condition of the county and the cost of processing said refunds.

This Court having heard testimony and reviewed evidence presented by the Defendants Madison County and the Tax Collector, and for the reasons hereinafter set forth, finds and holds that the testimony and evidence presented by Defendants is factually sufficient to find the County acted in good faith within the parameters of *Gulesian* prior to November 1, 1991, but is factually and legally insufficient for Madison County to bring itself within the parameters of *Gulesian* after that date. The Court having also considered the fiscal impact finds and holds that the named Plaintiffs and all class members who paid the charges levied by the previously mentioned ordinances are entitled to refund of all such monies paid subsequent to October 31, 1991, the payment of which was challenged, in Consolidated Case Nos. 90-198 and 92-173, for Years 1989 through 1993 in the total amount of $2,199,004.00 (Respondent's Exhibit A), plus interest. Interest shall accrue at the rate of 12 percent from the date of this Court's Final Judgment entered November 25, 1991, or from date of payment, whichever last occurred, as provided in Section 55.03, Florida Statutes (1993). No refunds are ordered for Special Assessments collected prior to November 1991.

AS TO GULESIAN AND COE

Madison County relies on *Gulesian*, and the statements therein, for its contention that it should not be required to make refunds of monies collected pursuant to the 1989 and 1990 Ordinances. This Court finds that its reliance is misplaced, particularly after October 1991, but even if the statements in *Gulesian* applied, such would not permit this Court to deny all refunds.

In *Gulesian* the refund was sought from the Dade County School Board, which had adopted its millage pursuant to a duly enacted state statute authorizing its millage levy in the amount adopted. In this case, Madison County both *adopted* the ordinances *and* levied the charges (assessments) pursuant thereto. Madison County cannot blame its actions on some act of the legislature. In *Gulesian* the school board acted *consistent* with the statute in levying its millage. Here, Madison County did *not comply* with the *general* statutes cited in its own ordinances as authority for the ordinances, and this was glaringly obvious.

In *Gulesian* the school board acted pursuant to an *apparently lawful statute* which specifically authorized the levy for millage in excess of the 10 mill cap for specific purposes. The law which authorized this millage was Chapter 71-263, Laws of Florida, enacted by the legislature to permit a limited levy in excess of that cap for specific purposes and to address the situation resulting from the *invalidation* by a Federal District Court of the 10 mill cap provisions of the Florida Constitution. The Supreme Court explained this stating:

> We are particularly impressed with the second finding of the trial judge stated just above, and with the arguments advanced in support thereof by Appellee and several intervening school boards. It appears therefrom that on February 24, 1971, the U. S. District Court for the Southern District of Florida *held that the limitation of millage elections to freeholders* contained in Article VII, Section 9(b) of the 1968 Florida Constitution *was unconstitutional*. The Federal District Court further held that the freeholder provision *was inseparable from the remainder of the text* and struck down Section 9(b) in its entirety. The Court also held F.S. Section 236.25, F.S.A. invalid.
>
> While this decision of the U.S. District Court was on appeal and prior to its modification by the United States Court of Appeals for the Fifth Circuit, the Florida Legislature enacted Chapter *71-263*, effective June 24, 1971, amending Section 236.25, to reinstate the 10-mill "cap" but permitting *levies in excess of 10 mills* if made for certain specific purposes set forth in the amendatory statute.

Gulesian, 281 So2d 327 (emphasis added). The Court noted that the school board had acted in "strict compliance" with Chapter 71-263, stating:

> The Dade County School Board in *strict reliance upon* the enabling authority of Chapter *71-263*, levied the .82 mills in excess of 10 mills for the purpose of funding its deficit in state matching of teachers retirement funds, then estimated at $7,700,000. Pursuant to this levy the sum in controversy, $7,300,000 was collected, deposited in the Board's general funds and paid

> to the State to cover the deficit in retirement matching.

Gulesian, 281 So.2d 327 (emphasis added).

The Supreme Court thereafter points out that, on March 31, 1972, the Fifth Circuit Court of Appeals *reversed* the District Judge by holding that the offensive language in Article VII, Section 9(b), *could be excised* from the remainder, which included the 10 mill cap, thus reinstating the constitutional 10 mill cap on school taxes. It stated:

> On March 31, 1972 the Fifth Circuit Court of Appeals held Section 9(b) of Article VII of the Florida Constitution not to *be invalid in its entirety*, but could be sustained by simply excising the offending provision relating to *free-holder elections*. The effect of this decision was to recognize the constitutional 10-mill cap limitation as valid, rendering invalid in the process – *at least prospectively* – the permissive provisions of F.S. Section 236.25, F.S.A., as amended for *excess levies*.

Gulesian, 281 So.2d at 327 (emphasis added).

Thus, the factual situation in *Gulesian* is different from that in the case at bar. The school board in *Gulesian* had *totally* complied with the 1971 statute in its levy, which had been enacted while Florida's constitutional 10 mill cap limitation had been declared invalid by a federal judge. Here, the county's ordinances did *not comply* with the statutes. The county acted *contrary* to the statutes.

The Court also notes that a Florida Supreme Court decision relying on *Gulesian* for a holding refusing to order a refund was recently reversed by the United States

Supreme Court in *McKesson v. Division of Alcoholic Beverages & Tobacco*, 110 S.Ct. 2238 (1990). More recently, the Florida Supreme Court ordered refund of funds collected through imposition of an impact fee in *Department of Revenue vs. Kuhnlein*, 19 Fla. L. Weekly S467 (Fla. Sept. 29, 1994), citing *McKesson*.

Gulesian was discussed in *Coe*. The *Coe* Court distinguished *Gulesian* factually making similar observations to those noted herein and held that the holding and reasoning of *Gulesian* did not prevent a refund of taxes held to have been unlawfully imposed. The contentions Broward County made in *Coe* are virtually the same as those made by Madison County here and are set forth as follows:

1. That the county acted in good faith in assessing the excess tax.

2. That the administrative cost to the county to process the refunds would be great, approximately $490,000.00, compared to the small average refund per taxpayer, approximately $10.00.

3. That the refund would have to be borne in part by taxpayers who would not participate in the refund, because of the change of ownership of property in the county since the tax was assessed.

4. That the collected taxes have already been spent and although the county has surplus funds on hand, those funds are for emergencies, such as hurricanes, and risk of harm to the public by using those funds outweighs the rights of the appellants to a refund.

Coe, 358 So.2d at 215-216. In rejecting Broward County's contention and reliance on *Gulesian*, the Court stated:

> First, we believe the the law to be that a *taxpayer is normally entitled to a refund of taxes paid pursuant to an unlawful assessment.* We construe the Supreme Court's ruling in *Gulesian* to have carved out a very narrow exception to the taxpayer's right to a refund.
>
> The point most emphasized by the Supreme Court in *Gulesian* was the good faith of the school board in making the assessment.

Coe, 358 So2d at 216 (emphasis added). In addressing each contention, the Court stated:

> And, since this Court found the assessment to *be contrary to the "obvious" intent of the legislature, we do not believe that good faith can be presumed.* Further, we do not believe that the findings related to the surplus funds and their availability for emergencies, and the change in ownership of the property taxed are sufficient to defeat the taxpayers' right to a refund.
>
> The remaining question is whether the finding by the trial court that a refund would result in a disproportionate expense to the county, as compared to the benefit to the average taxpayer, is sufficient in itself to support a denial of the refund. *If this factor alone is to be determinative of the issue, then the Taxpayer would almost never be entitled to refunds of illegally assessed taxes, since there will always be relatively high administrative costs in processing* tax refunds. We do not feel the Supreme Court in *Gulesian* intended to so limit the rights of taxpayers. A taxing authority must

> demonstrate more than the mere expense of processing refunds in order to deny the taxpayers their right to a refund of the illegally assessed taxes.

Coe, 358 So.2d at 216-217 (emphasis added). In this case, as in *Coe*, Madison County has acted *contrary* to the *intent* of the *legislature*.

GOOD FAITH

The County has presented testimony and evidence to attempt to show it has acted in "good faith", citing *Gulesian*.

In deciding whether the County acted in "good faith" it is necessary to consider separately the County's actions prior to the November 1991 ruling by this Court and its actions subsequent to that date.

PRIOR TO NOVEMBER 1991

Prior to November 1991, Mr. Fain Poppell, former county commissioner and chairman (1988-1992), testified that beginning in 1988, in search of additional revenues for various services the County Commission considered necessary, the County representatives attended various state meetings and was informed by the State Association of County Commissioners that the use of special assessments was the best source recommended. The County then hired legal counsel it understood to be an "expert" in this field by virtue of his having helped to draw the enacted state legislation on Special Assessments. The County also held various workshops and public hearings,

utilized the services of a CPA, and determined that it could not provide the desired services without Special Assessments and, at the same time, maintain a proper fiscal posture.

The County adopted the 1989 Ordinances and when suit was filed in May and June 1990 challenging the ordinances and assessments levied, the County enacted new ordinances, attempting to correct the 1989 ordinances, but these also failed to comply with the state statutes. Although it is difficult to imagine how the County was not then aware of the deficiencies and resulting illegality of its Special Assessment Ordinances, the Court does recognize that governing bodies cannot always await possible lawsuits prior to making collections under revenue ordinances. The ordinances did in the beginning have a presumption of legality.

The Court finds that having carefully reconsidered and reviewed all of the testimony and evidence presented, the County did, prior to November 1, 1991, act within the "good faith" parameters of *Gulesian* and is therefore not required to refund those monies paid prior to November 1, 1991 pursuant to the Special Assessment Ordinances.

AFTER NOVEMBER 1991

The County Commissioners here involved, both past and present, are all good persons trying to deal with various mandated programs. This Court is aware that both our own State as well as the Federal Government have imposed costly requirements upon the County. In many cases this has been done without then providing

adequate funding and seemingly without giving serious thought to the County's ability to pay. However, that old adage that "two wrongs do not make a right" is certainly apropos in the present situation. The solution should not have been to continue collecting and spending revenues from Special Assessments previously found to be illegal.

While appeal was pending, and in spite of this Court's Final Judgment of November 25, 1991 invalidating all of the ordinances and ordering refunds, the County continued to levy and collect the assessments levied pursuant to the ordinances. However, recognizing that nonpayment would result in the sale of certificates which could result in liability to the County for improper sale of certificates based on invalid assessments, the County entered into identical stipulations in Case No. 92-173 in both 1992 and 1993 for 1991 and 1992 assessments respectively. These stipulations were submitted to this Court and injunctions entered halting the sale of certificates. At the same time, the County continued to collect assessments and spend the money in total disregard of this Court's decision finding such action illegal. Former Chairman of the County Commission, Mr. Poppell, on cross-examination testified that he knew of the stipulations and this Court's injunction order, but the County continued to spend the money anyway. This certainly is not "good faith" action by the County. The stipulation dated May 27, 1992 provides in part:

> 3. The issuance of tax certificates will cause great confusion if this Court's Summary Final Judgment in Case No. 90-198-CA is affirmed by the highest appellate court exercising jurisdiction, as during the appellate process

> tax certificates may be issued to third parties. This would, of course, subject the Defendant Madison County, Florida, to potential third party claims for invalid certificates and create liens and clouds on citizens' property for a period of time based on insufficient legal authority. Also, persons failing to pay their assessments will be required to *either pay the assessments or have a lien placed against their property that could effect its marketability for a period of time.*
>
> * * *
>
> 5(b). If such ordinances are ultimately found to have been lawfully enacted the defendants may issue, at the end of the collection process of the year following such final determination, tax certificates for the principal amount of all delinquent special assessments, plus interest at the legal rate compounded annually, and normal collection costs.
>
> c) If such ordinances are found to be unlawful, and a refund ordered all special assessments and/or non-ad valorem assessments collected pursuant thereto shall be held void *and refunds shall be made to plaintiffs and all members of the class paying same.*

(Emphasis added.) This Court's injunction order entered May 28, 1992 states:

> That the Defendant, WES KELLY, Tax Collector, be and he is hereby restrained and enjoined from the selling of tax certificates on the property of the Plaintiffs who have failed to pay their special assessments levied pursuant to Ordinance Nos. 89-26, 89-27, 89-28, 89-29, 33, 34,

-35 and 36, for tax year 1991 until further order of this Court.

It is further ordered that all monies paid by Plaintiffs and the members of the class they represent shall be received and utilized together with other funds received by the Defendant, MADISON COUNTY, FLORIDA, so as to insure that adequate funds shall be available to pay any refund that might ultimately be ordered by this Court originally or pursuant to an appellate mandate.

Mr. Poppell testified that the County authorized the stipulations because of the reasons stated in the stipulations. On cross-examination by counsel for Plaintiffs, he testified as follows:

Q. Yes, sir, Now the next paragraph, "If such ordinances are found to be unlawful and a refund ordered, all special assessments and/or non ad valorem assessments collected pursuant thereto shall be held void and refunds shall be made to the Plaintiffs and all members of the class pending same."

What does that mean?

A. That means that we would refund it with interest.

Q. Wasn't the purpose of this to try to find some way to maintain the status quo so as take [sic] to cause just as little injury as possible to both the County and the citizens?

A. That's correct.

Q. Now, I showed you at the same time I took your deposition a copy of an order which was

executed by Judge Peach and I'm going to read you two paragraphs from it.

"It is ordered and adjudged that the Defendant, Wes Kelly, Tax Collector, be and is hereby restrained and enjoined from the selling of tax certificates on the property of Plaintiffs who have failed to pay their special assessments levied pursuant to Ordinance Numbers 89-26, 89-27, 89-28, 89-29, 33, 34, 35 and 36 for tax years 1991 until further order of this year [sic]."

I ask you had you seen that before and what was your answer?

A. Yes.

Q. And in the next paragraph said there is a further order that "All monies paid by the Plaintiffs and members of the class they represent shall be received and utilized together with other funds received by the Defendant Madison County, Florida, so as to ensure that adequate funds shall be available to pay a refund that might ultimately be ordered by this Court the revenue [sic] are pursuant to appellate mandate."

Now, what does that mean to you?

A. Refund.

Q. That you're supposed to do something with the money to hold it?

A. Yes, sir.

Q. And that's the same answer you gave me during the deposition, isn't it?

A. Yes, sir.

Q. That the money should be set aside?

A. Yes, sir.

Q. Was any money set aside?

A. No, sir.

Excerpt of Proceedings, Testimony of Fain Poppell, at 36-38.

Not only are the County's actions not "good faith", they are instead a blatant example of "bad faith." The County's testimony that it acted on advice given by counsel for the Defendants that the case was winnable on appeal is certainly no excuse for its action. Mr. Mercer, the county auditor testified that he knew of the outstanding possible liability, and that one of his duties as county auditor was to advise the county of same in his yearly report. He said that he did not do that based on advise [sic] of counsel for the county that the case was winnable on appeal. For the County Commission to then take the position that it need not worry about it because the Court's ruling might be reversed on appeal displays an irresponsible and cavalier attitude by the Commission that this Court can neither understand nor condone.

The excuse given by one witness – a former county commissioner – that the County had other things to pay for (the county jail) and that if he did not pay for same he might be put in jail is certainly no excuse for using funds derived from levies that had been declared invalid. Furthermore, no threat of jail from this Court for anyone ever existed.

Former County Commissioner and Chairman Poppell testified that the board was told prior to adoption of the 1989 ordinances that its proposed levies being considered

were of questionable validity. Suit was filed pointing out the deficiencies in May and June, 1990, and it still continued to assess, collect and spend. It then adopted the 1990 ordinances which had the same deficiencies as the 1989 ordinances. On October 3, 1991, the hearing was held on Plaintiffs' Motions for Summary Judgment in the suits challenging the ordinances. At conclusion of the hearing, the Court announced its ruling that the 1989 and 1990 ordinances were invalid for failure to comply with Section 125.01(1)(q) 2, F.S. (1987). This ruling was then confirmed in writing by Judgment entered November 25, 1991. The 1991 Special Assessment collection period did not begin until November 1, 1991, yet Madison County continued to assess, collect and spend under the same 1989 and 1990 ordinances which had then been declared invalid. At that point, there is no way that continuing to spend the money derived from the 1989 levies through the 1993 levies, can be found to be in "good faith." Continuing to levy, collect and spend subsequent to November 1, 1991, pursuant to the 1989 and 1990 ordinances which failed to comply with the general statutes cannot be "good faith."

MADISON COUNTY'S FISCAL CONDITION

The County has presented testimony as to its present fiscal condition contending that it will be a fiscal hardship or be impossible for it to refund the money now and, accordingly, this Court should deny the refund. Since it has already spent most of the money, the County contends that this self-created fiscal condition should be a sufficient basis to deny the refund. This contention must be rejected for two reasons. *First*, if the County had

exercised sound judgment and chosen a prudent course of action, it would have complied with its stipulations and this Court's injunction, and it would have held the funds collected and such would be available for refund. That is what was provided for by its' [sic] stipulation and this Court's injunction.

Second, in spite of the fact that this Court had invalidated the ordinances and ordered refund of the funds collected pursuant thereto, the County continued to assess and collect monies and *spend it* pursuant to said ordinances for three more years. This egregious action is amplified by the fact that the County obviously knew of the risk it was taking, because it executed stipulations authorizing this Court to enjoin the sale of certificates for nonpayment for 1991 and 1992 levies. In these same stipulations it agreed that refunds would be made if so ordered, which certainly necessitates a course of conduct so that it can comply with the stipulations. This Court's [sic] consented to injunction enjoining the Defendant tax collector from selling certificates and also ordered that " . . . all monies paid by Plaintiffs and the members of the class they represent shall be received and utilized by the Defendant Madison County, Florida, so as to insure that adequate funds shall be available to pay any refund that might ultimately be ordered by this Court originally or pursuant to appellate mandate."

Thus, the County not only exercised totally irresponsible judgment in continuing to levy the charges and spend the money collected, it violated both the letter and spirit of its stipulations and this Court's injunctive orders. Instead of acknowledging the problem, the County chose to proceed as if wearing blinders.

The County's actions can be likened to those of a parent who says he wants the best for his child and then buys cars and other expensive items that he knows he cannot pay for and then when he can't pay the debts says that his actions were in good faith because he expected to win the lottery. That is blind faith not good faith. That is not the proper attitude for the governing board of the county responsible for administering the affairs of the County to take.

Thus, Madison County's present fiscal position is self-created by its imprudent judgment. Blaming it on advice of consultants and its attorneys does not excuse it from its responsibility.

The testimony of the Defendants' witnesses was that there was $648,000.00 left from special assessment collections available for refund, and that the present reserve was about $803,000.00. The Plaintiffs then referred to this reserve as an indication of the ability of the County to pay towards the refund. Mr. Mercer, the county auditor, who originally testified as to the $803,000.00 figure was then recalled as a witness by the County and changed his testimony to say that he had overlooked several matters and the amount of $803,000.00 was incorrect and should be several hundred thousand dollars lower. He stated the figure erroneously included $225,000.00 to be derived from a franchise fee that had not even been enacted and is nonexistent and also included a one percent gas tax that was nonexistent. This type evidence is misleading and certainly does not show good faith with the Court.

The Court finds and holds that a refund is not fiscally impossible, but is fiscally possible, particularly if the total

does not have to be refunded immediately. Madison County's present fiscal condition is brought about directly because it chose to ignore the Court's Final Judgment and failed to honor its stipulations and the Court's injunctive orders.

COST OF REFUND

The County offered the testimony of Mr. Mercer, the County Auditor, to attempt to establish that the cost of refund is so prohibitive as to justify an order from this Court denying refunds. Mr. Mercer testified that his estimate of the cost of refunding the money would be about $153,000.00 which he said included hiring a consultant at $50 per hour to verify each refund as to eligibility and amount. On cross-examination he acknowledged that verification was already done each year by the property appraiser in the certification and extension to the tax roll to the tax collector, and by the tax collector in his collection process and preparation of his yearly final report to the county clerk and board, which was audited by the county auditor. On cross-examination, Mr. Mercer also demonstrated his lack of knowledge and understanding of the assessment roll preparation and collection process. He was unfamiliar with the tax roll or special assessment roll preparation process and ultimately admitted that refund checks could be prepared and mailed in about the same manner as tax notices are printed and mailed.

On redirect he admitted that the tapes could be used in the refund process as had been suggested by counsel for Plaintiffs on cross-examination. The county clerk testified that the total cost for computer work including the

rolls and programs necessary to perform the duties of both the tax collector and the property appraiser was $54,000.00 a year.

Mr. Grissett, testifying for the Plaintiffs, was qualified as an expert on the refund procedure of county funds. He testified that all the necessary information was already contained in the records of the tax collector and the County. The rolls contain the name, address, property description, parcel number, a second identification number, and the amount paid to the tax collector as non-ad valorem/special assessments on each parcel. The tax collector agreed with Mr. Grissett's statements on cross-examination by Plaintiffs' counsel. Mr. Grissett explained that it should be a relatively simple matter to have the computer company serving the tax collector and property appraiser to prepare a program which would show the name, address, parcel number and the second identification number, the property description, and the amount paid on each parcel, since the tax collector was required by law to have this information when he compiles his final report for the county showing receipts and collections for each parcel in the county, and because he had to have it to print the tax notices (bills) containing both ad valorem and non-ad valorem assessments amounts. The non-ad valorem assessment rolls, like the ad valorem tax rolls, are printed and transmitted through the use of computer tapes which contain all the information. The computer would then be "told" to print the checks in the same way that the computer is told to print tax notices each year and in the same way that the property appraiser extends millage on the tax roll yearly. This is simply multiplication of the value times the millage and

is done through a computer program. He testified that he had been employed by the Department of Revenue for 25 years and had supervised tax collectors in the performance of their duties which included refunds, and provided advise [sic] on refunds of monies collected by the tax collectors held by local government bodies on numerous occasions. He gave several instances when his (the Department of Revenue's) recommended procedures had been used to process refunds where many refunds were being made.

The tax collector on cross-examination testified that the computer tapes and all the records were public records and were available because he had to have them to do his yearly final report of persons paying and the amount paid on each parcel.

Mr. Grissett did not testify as to the cost of this process but said it would be much less than Mr. Mercer's estimate of $153,000.00. The Court finds Mr. Grissett's testimony to be more credible. The Court is cognizant of the statutory duties of the tax collector and property appraiser. The tax collector not only prints and mails tax notices for ad valorem taxes and special assessment notices (two-part notice) for non-ad valorem assessments, he also collects money for vehicle license tags, occupational license taxes, boat restrictions, and hunting and fishing licenses, each of which requires at least one computer program. The property appraiser has computer programs for administration of exemptions and agricultural assessment which includes the printing and mailing of exemption and agricultural renewal cards, as well as the assessment of ad valorem taxes which includes printing and mailing of the TRIM notices and the extension of

millage to calculate same so that the amount of taxes due will be shown on the ad valorem tax roll certified by the property appraiser to the tax collector for collection.

The Clerk testified that the total cost for computer service for both the tax collector and property appraiser was $54,000.00 yearly. If all the functions of both offices costs only $54,000.00 yearly, the preparation of a tape containing a list of all property, the names of the owners, the description numbers and the amount received by collection on each parcel certainly would be far less. The main additional cost involved would be postage, signing checks, and mailing.

Accordingly, the Court finds that the cost of making the refund does not justify denying refunds. The Court further notes the pronouncement in *Coe* concerning cost of refund where that court rejected Broward County's argument that an administrative cost of approximately $490,000.00 compared to an average refund of $10.00 per taxpayer, justified refund denial. The Court notes that the average refund at bar per year will be considerably more. than $10.00 per person because of the amount of the charges. For instance:

Ambulance Service:	
Residential	$ 48.00
Restaurant (small)	144.00
Service Station (large)	24.00 per 1,000 square feet
Landfill Closure:	
Residential	$ 32.00
Restaurants (small)	126.00
Service Station (large)	21.00 per 1,000 square feet

Garbage Service:	
Residential	$ 70.00
Restaurant (small)	210.00
Service Station (large)	35.00 per 1,000 square feet
Fire Protection:	
Residential	$ 20.00
Restaurant (small)	$ 30.00
Service Station (large)	5.00 per 1,000 square feet

Most taxpayers will have paid some or all of these.

Many people never paid the charges from the beginning starting in 1989, and for that year, the County never attempted to foreclose on their property to coerce payment. For 1990, certificates were sold on property of owners who did not pay and those ultimately had to be redeemed and cancelled [sic] with the County paying up to 18 percent interest. For 1991 and 1992 years, the County executed stipulations so no certificates were sold for unpaid special assessments. Thus, in each year since 1989, some persons paid and some did not. Cohen Bond, Madison County Coordinator, testifying for the Defendants, testified as to the percentage of persons paying each year, although his testimony was disputed in closing argument by counsel for the Defendants.

Thus, in its present posture, the County is asking this Court to deny refunds to those who did pay, even though many property owners never paid. This certainly is not fair and does not treat those who did pay and those who did not pay the same. Equal treatment is required of all so that no one should be treated differently. This is recognized in *McKesson* which also points out that failure to give refunds of monies unlawfully collected constitutes a

denial of due process. At bar, it would also constitute a denial of equal protection of the law.

Counsel for Plaintiffs contend that this Court should allow interest from the time of payment since that is the only way those who paid and those who did not pay can be treated the same, and that such is appropriate in light of the Florida and United States Supreme Court decision in *McKesson*.

Even though the 1989 and 1990 assessments are invalid, the Court has found the County to have acted in "good faith" in collection of the assessments prior to November 1, 1991 and therefore, the Plaintiff and the class members who paid the assessments imposed by Ordinances 89-26, 89-27, 89-28, 89-29, and 1990 Ordinances 33, 34, 35 and 36 for Years 1989 and 1990 are not entitled to refund of those amounts paid prior to November 1, 1991.

For refunds of assessments for Years 1991, 1992 and 1993 challenged in Case No. 92-173, the Plaintiffs are entitled to refund of those amounts paid after October 31, 1991, together with post judgment interest following the November 25, 1991 Final Judgment pursuant to Section 55.03, Florida Statutes (1993), at the rate of 12 percent, such interest to be computed from the date of payment. See *Palm Beach County vs. Town of Palm Beach*, 579 So.2d 719 (Fla. 1991). This is not prejudgment interest as Case No. 92-173 which challenged the assessments for each of those years was held in abeyance by stipulation of the parties recognizing that since the ordinances and assessments and issues raised concerning same were identical in both cases, the outcome in the first case would control

the outcome of the second. Thus, this Court's Final Judgment finding the Ordinances and assessments invalid, null and void controls Case No. 92-173. The only issue remaining to be resolved in Case No. 92-173 was the refund issue remanded to this Court and accordingly the cases were consolidated for disposition on remand. The County continued to assess and collect the assessments after this Court's Final Judgment dated November 25, 1991 and now must make refund.

The parties are directed to present to the Court no later than 7 days prior to March 1, 1995, a proposed plan whereby refunds can be made and a procedure for implementing the process. Such plan shall provide an acceptable method of providing notice to persons entitled to receive refunds who wish to exclude themselves from the class and to renounce their entitlement to refund. Obviously, any of those entitled to a refund may reduce the fiscal impact on the County by waiving their refund entitlement.

The Court reserves jurisdiction to consider proposed refund plans and implementation thereof, motions to tax costs, and to determine the award of attorneys' fees, and for further hearing on the remand of the *Foxx* case.

DONE AND ORDERED in Chambers at Jasper, Hamilton County, Florida, this 31st Day of January, 1995.

/s/ John W. Peach
JOHN W. PEACH
Circuit Judge

Copies furnished to:

Larry E. Levy, Esquire
Toby Buel, Esquire
Edwin B. Browning, Jr., Esquire
Ken van Assenderp, Esquire

Copies mailed: 2/1/95
By: C. Hall

MADISON COUNTY, Florida, political subdivision of the State of Florida, and Wes Kelly, tax collector Madison County, Florida, Appellants,

v.

Wiley D. FOXX and Quinton Dryden, et al., Appellees.

No. 91-4119.

District Court of Appeal of Florida, First District.

Feb. 9, 1994.

Rehearing Denied June 2, 1994.

County residents brought action challenging validity of county ordinances which levied special assessments for various services provided by county. The Circuit Court, Madison County, John Peach, J., invalidated ordinances and ordered county to refund monies paid by county residents. On appeal, the District Court of Appeal, Smith, J., held that: (1) county totally failed to comply with statutory authority under which it purported to act and, therefore, county ordinances were null and void; (2) material issue of fact as to whether charges levied by county were "special assessments" precluded summary judgment; and (3) material issue of fact as to whether county was required to refund special assessments dollars paid by county residents pursuant to invalid ordinances precluded summary judgment.

Affirmed in part, reversed in part, and remanded.

Edwin B. Browning, Jr. of Davis, Browning & Schnitker, P.A., Madison; Ken Van Assenderp, Tallahassee, for

appellants Madison County, FL and Wes Kelly, Tax Collector, Madison County, FL.

Robert I. Nabors, Sarah M. Bleakley and Thomas H. Duffy of Nabors, Giblin & Nickerson, P.A., Tallahassee, for appellees amici curiae Florida Ass'n of Counties, Inc. and Florida Ass'n of County Attys., Inc.

Robert H. Graddy and Toby Buel of Three Rivers Legal Services, Inc., Lake City, for appellee Wiley D. Foxx.

Larry E. Levy, Tallahassee, for appellee Quinton Dryden, et al.

Kathy N. Grunewald and Alice M. Vickers, Florida Legal Services, Inc., Tallahassee, for appellee amicus curiae Florida Legal Services, Inc.

SMITH, Judge.

Madison County appeals a final summary judgment invalidating its 1989 and 1990 ordinances levying special assessments for various services provided by the County, and ordering the County to refund monies paid by county residents. Wiley D. Foxx cross-appeals the trial court's dismissal with prejudice of count III of his amended complaint which sought recovery under 42 U.S.C. section 1983. We affirm in part, reverse in part, and remand for further proceedings.[1]

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[1] For organizational purposes, the adjudicatory portion of this opinion will be divided into sub-parts.

Madison County adopted four ordinances in 1989 purporting to levy special assessments[2] against property located within the county for garbage collection and disposal, landfill closure, ambulance service, and fire protection. The fire assessment was made effective in the unincorporated areas of the county only. The assessment for solid waste collection and disposal applied to property in the unincorporated area and within the municipality of Lee. The landfill assessment and the assessment for ambulance service was made applicable in the unincorporated areas of the county and within the county's three municipalities: Lee, Greenville, and the City of Madison.

Section 2 of each of the four ordinances imposed the special assessments pursuant to section 125.01(1)(q)2., Florida Statutes (1989). Each ordinance described the type of property to be subject to the assessment,[3] stated the

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[2] As a matter of clarification, special assessments, or non ad-valorem assessments as they are called by section 197.3632, Florida Statutes, are assessments against property which are not based on millage and which can become a lien on the homestead pursuant to Article X s 4 of the Florida Constitution. s 197.3632(1)(d), Fla.Stat.

[3] Each assessment applied to homestead property. All improved residential, commercial and industrial property was liable for each of the assessments. The fire assessment was imposed against every parcel in the affected areas, including vacant property. Vacant property was exempt from the solid waste collection and disposal assessment, the emergency medical services/ambulance assessment, and the solid waste landfill assessment.

rate of the assessment for each property class,[4] and provided for the collection of the assessment by the tax collector.[5] The ordinances contained the statement that these assessments provide a special benefit to the property charged.

Each ordinance detailed the manner in which a lien would be placed upon the property in the event of nonpayment and stated that foreclosure could be pursued to enforce delinquent assessment liens. They afforded relief for indigents by providing that after an administrative determination of indigency, and during the pendency of indigency, the lien would not be enforced while the indigent and/or indigent spouse and/or indigent minor reside in the homestead as a residence.

On December 6, 1989, the County adopted a Resolution indicating its intent to collect the special assessments on the ad valorem tax bill, and invoking the statutory collection method provided for in section 197.3632, Florida Statutes, and the related provisions of section 197.3635, Florida Statutes. The Resolution purported to

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[4] Each ordinance contained the proviso: "The rates contained in this ordinance applicable to residents of the cities of Greenville, Lee, and Madison may not be changed by the Board of County Commissioners without the consent of the applicable city governing body."

[5] The uniform non-ad valorem assessment procedure to affix assessments on the ad valorem tax bill, set forth in section 197.3632, Florida Statutes (1989) was not available until the tax bill of 1990 and therefore the ordinances provided an alternative collection method – separate mailing of these special assessment bills.

fix the boundaries within which the charges are to be levied.[6]

The validity of the 1989 ordinances was challenged by two court proceedings: one for declaratory and injunctive relief filed by Wiley D. Foxx, a resident of the City of Madison; and the second, a class action suit on behalf of county residents filed by Quinton Dryden. The two cases were consolidated. In response to the suits, the County passed four new ordinances in 1990, amending the 1989 ordinances.[7] These 1990 ordinances, which with the exception of the fire ordinance employ virtually identical enabling language, exhibit the County's confusion regarding the statutory provisions under which the County was proceeding and the appropriate mechanism for levying special assessments.

At the outset, the three 1990 ordinances concerning garbage collection and disposal, landfill closure, and ambulance service, characterize the corresponding 1989 ordinances' reliance on section 125.01(1)(q)2. – the named enabling statute – as a "scrivener's error," and by means of these later ordinances attempt to correct the error by changing the referenced statute to "section 125.01(1)(q)1,

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[6] Though the 1989 ordinance levying the special assessment for fire protection was expressly applicable only in the unincorporated areas of a county, the Resolution provided for the collection and enforcement of this assessment for fire control from "each parcel of real estate situated in the unincorporated areas of Madison County, Florida, *and the City of Lee, Florida.*" (Emphasis supplied).

[7] The validity of the 1990 ordinances was attacked in an amended complaint.

Florida Statutes." Only the 1990 fire ordinance retains reliance on section 125.01(1)(q)2. as enabling legislation.

Because the County was uncertain whether imposition of these special assessments dealing with garbage collection and disposal, landfill closure, and ambulance service, required the creation of a Municipal Service Taxing Unit (MSTU), or a Municipal Service Benefits Unit (MSBU), or a special district,[8] or apparently whether the County had to contract with the cities to provide these services, the County claimed authority to act under Article VIII(1)(f) of the Florida Constitution, section 125.01(1), section 125.01(1)(q)1., section 125.01(5)(a), and section 125.0101(2).[9] For fire protection, the County claimed authority to act under Article VIII(1)(f) of the Florida Constitution, section 125.01(1), section 125.01(1)(q)2., and section 125.01(5)(a). *None* of these ordinances referenced section 125.01(1)(r), Florida Statutes.

Finally, the 1990 ordinances for garbage collection and disposal, landfill closure, and ambulance service require the affected cities to agree to the inclusion in the MSTU, MSBU, or district, and that "[a] certified copy of

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[8] According to an explanation offered by counsel for Amici Curiae, the distinction between a municipal service taxing unit and municipal service benefit unit is that a benefit unit is the correct terminology when the mechanism used to fund the county's services is derived through service charges or special assessments rather than taxes. A special district is a separate unit of government which may possess such powers as are authorized by law.

[9] We find the citation to section 125.0101(2) incomprehensible, since it plainly states that it does not provide authority to counties to impose special assessments.

the Resolution agreeing to the inclusion must be received by the County prior to December 1, 1989, and shall be effective for 1989 and each subsequent year." The ordinances also mention measures to comply with section 125.01(5)(a).

In the meantime, on October 3, 1989, the City of Madison adopted a resolution concurring in the creation of a municipal service taxing or benefit unit within the city; however, the resolution by its terms was conditioned upon the concurrence and the creation of such unit by the other two cities – Greenville and Lee. On April 3, 1990, the City of Greenville adopted a similar resolution also conditioning its concurrence upon the concurrence of the other affected cities. The City of Lee never adopted a resolution concurring in the creation of a municipal service taxing or benefit unit or district.

Some, though not all, Madison County residents paid the special assessments. After Foxx filed suit, he and the County entered into a consent decree in which it was agreed that he would not pay assessments until a court determination. The County agreed it would place a lien on his property for the unpaid assessments but would not execute on the lien.

Foxx and Dryden, et al., maintained that the ordinances were deficient because: (1) the County failed to comply with section 125.01(1)(q)2., requiring that special service units be established by April 1 of the effective year; (2) the County failed to comply with section 125.01(5)(a) by gaining the consent of the municipalities to the applicability of the ordinances within their territory; (3) the charges levied by the ordinances were not

special assessments providing special benefits to the property charged, but were instead taxes for the general benefit of the public; (4) the levies were not reasonably proportioned between the properties affected; and (5) the levies violated Article VII § 6, and Article X § 4 of the Florida Constitution governing homestead exemptions. Appellees also requested a refund of all levies previously paid.

Foxx alleged a violation of his civil rights under 42 U.S.C. section 1983 in count III of his complaint. The trial court granted the County's motion to dismiss count III with prejudice, finding from an examination of Foxx's amended complaint that no deprivation of a federal right exists in this controversy, and that the amended complaint could not be amended to show such a deprivation.

Foxx and Dryden, et al., moved for summary judgment. In response to the motion, the County filed affidavits of an expert economist, a certified real estate appraiser, an accountant and county auditor, a government expert, and the chairman of the Board of County Commissioners of Madison County. These affidavits asserted the County's good faith in the adoption of the ordinances, the reasonable apportionment of the assessments, and that they provided a special benefit to the property.

At this juncture, we would point out that resolution of this appeal requires reference to pertinent Florida constitutional provisions, and the statutory criteria of

Chapter 125.[10] For convenience, we relegate these provisions to *"Appendix A,"* found at the end of this opinion.

Regarding the County's compliance with these provisions, the trial court made the following findings of fact, in pertinent part:

> 8. The MSTU or MSBU whose boundaries were set forth in the December 6, 1989 resolution adopted by Madison County never came into existence because it was never approved by all of the affected cities.
>
> 9. Madison County never complied with the provisions of Section 125.01(5), F.S., because approval of the governing bodies of all the affected incorporated areas, (the City of Greenville, the City of Madison, and the City of Lee), was never obtained. Only the City of Madison adopted a resolution prior to January 1, 1990, the City of Lee never adopted a resolution, and although the City of Greenville did adopt a resolution it was not timely in that it was not adopted until April 3, 1990, and both of the resolutions adopted by the two cities expressly provided that the approval was a conditional approval conditioned upon the approval of all affected cities.
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> 10. Madison County did not comply with the provisions of Section 125.01(1)(q)2, F.S. (1987), by virtue of the fact that the required county and municipal ordinances and approval of the affected electorate was not completed and notice

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[10] For our purposes, the provisions of Chapter 125 with which we are concerned are identical in the 1987 and 1989 Florida Statutes.

> thereof given to the Property Appraiser at least 9 months prior to the beginning of the fiscal year for which such a unit is first established, and never complied with the statute because approval was never done by a majority of the electors of the municipality or the portion thereof affected for either the 1989 levies or the 1990 levies.

The trial court ruled, in essence, that the 1989 ordinances were invalid for failure to comply with section 125.01(1)(q)2., the statute expressly named in the ordinances as the authority for their adoption. Similarly, the 1990 ordinances were invalid for failure to comply with any of the statutes referenced in them as providing authority for the special assessments. Pertinent to this ruling, the trial court made the following conclusions:

> 1. Section 125.01(1)(q)2, F.S. (1987), provided the authority for a county to establish by ordinance a municipal service taxing unit for any part or all of the unincorporated area of the county and any municipality within the county or any part thereof, within which may be provided fire control and rescue services from funds derived from service charges, special assessments or taxes within such unit only, subject to the conditions set forth in the statute that no municipality or portion thereof shall be included within such unit unless such inclusion is approved by ordinance of the municipality and by a majority of the electors of the municipality or the portion thereof affected, voting at a regular or special election. The statute further required as a condition prerequisite that all the required county or municipal ordinances and

approval of the affected electors shall be completed at least 9 months prior to the beginning of the fiscal year for which such a unit is first established, and notice thereof given to the Property Appraiser. It is undisputed that none of the conditions set forth in this statute were complied with for the levies made pursuant to the 1989 or 1990 ordinances.

Furthermore, this statute only allowed such a municipal service taxing unit to be created for providing fire control and rescue services and the County ordinances for 1989 and 1990 authorized a levy for fire protection, ambulance service, garbage collection and disposal, and landfill closure. Assuming that the term "rescue services" as used in the statute includes ambulance services, two of the four ordinances provided for charges for services not authorized by the statute. Three of the County's 1989 ordinances as amended by the 1990 ordinances are clear that they are intended to apply not only in the unincorporated areas of the county but also within the cities. The ordinance for fire protection is the only ordinance that purports to levy a charge solely in the unincorporated area and it was levied in 1989 pursuant to Section 125.01(1)(q)2., F.S., instead of Section 125.01(1)(q)1., F.S.

This court finds and holds that since the County failed to comply with the provisions of Section 125.01(1)(q)2., F.S., that the ordinances are illegal, unauthorized, null and void.

It should be added that section 125.01(1)(q)1., upon which the County attempted to rely for three of its 1990 ordinances, is not applicable because by its express terms,

it applies when the County is attempting to levy special assessments in the unincorporated areas only, whereas, in the three ordinances concerning garbage collection and disposal, landfill closure, and ambulance service which cited this statute as authority, the County was attempting to impose the special assessments in municipalities as well as unincorporated areas. The 1990 fire ordinance is the only one made applicable to unincorporated areas only, and that ordinance, rather than citing section 125.01(1)(q)1., which arguably was applicable, cited section 125.01(1)(q) 2. as authority. As the trial court found, the County failed to comply with the provisions of section 125.01(1)(q)2.

Regarding the other challenges by the plaintiffs, the trial court ruled as a matter of law that the charges levied were not special assessments, but instead were taxes for the general benefit of the county, and therefore violated general law and the constitutional homestead provisions, Article VII § 6 and Article X § 4, which prohibit any levies other than special assessments to alter the homestead protection. The court added that the County's levies were nothing more than an annual charge made to defray the cost of a particular expense incurred by the county in providing a particular service, and no particular property is specially benefitted. The court commented that the levies were simply an attempt to circumvent the homestead tax exemption provided in the Constitution. The court granted the plaintiffs' motion for summary judgment entitling the plaintiffs to the relief prayed for, including refund of all monies paid.

I.

The County argues on appeal,[11] as it did before the trial court, that even though the ordinances reference the wrong statutes, this is nothing more than harmless error. According to the County, Article VIII § 1(f) of the Florida Constitution and section 125.01(1)(r) give the County broad home rule power to impose special assessments county-wide (unincorporated and incorporated areas) unless the affected city or cities "opt out" by passing inconsistent legislation.

In response, appellee Dryden maintains that section 125.01(1)(r) does not grant a non-charter county the broad home rule authority to assess special assessments for furnishing municipal services within a municipality absent municipal consent. Dryden contends that when Chapter 125, and in particular section 125.01, was enacted in 1971 to implement county home rule authority, counties did not have authority to furnish municipal services beyond the unincorporated areas of the county; and further, that the present language of section 125.01(1)(q) was added to the statute in order to provide a means for a non-charter County to furnish municipal services in a city, but only if the city approved.

At this point, a brief review of the legislative history of section 125.01(1)(q) and (r) is helpful. As originally enacted in 1971, section 125.01(1)(q) and (r) provided:

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[11] In this opinion, references to the arguments of the County include and encompass the arguments advanced by Amici Curiae.

125.01 Powers and duties. –

(1) The legislative and governing body of a county shall have the power to carry on county government. To the extent not inconsistent with general or special law, this power shall include, but shall not be restricted to, the power to:

* * *

(q) Establish, and subsequently merge or abolish those created hereunder, special purpose districts for any part or all of the unincorporated area of the county, within which may be provided fire protection, law enforcement, beach erosion control, recreation facilities, water, streets, sidewalks, street lighting, garbage and trash collection and disposal, waste and sewage collection and disposal, drainage, and other essential facilities and services from funds derived from service charges, special assessments, or taxes within such district only.

(r) Levy and collect taxes and special assessments, borrow and expend money, and issue bonds, revenue certificates, and other obligations of indebtedness, which power shall be exercised in such manner, and subject to such limitations, as may be provided by general law;

According to a synopsis of legislative history contained in *Gallant v. Stephens*, 358 So.2d 536, 538 n. 1 (Fla.1978), section 125.01(1)(q) created "special purpose districts," without indicating whether referenda would be required. In several opinions, the attorney general found that Article VII § 9(b) of the Florida Constitution required a referendum. Ops.Att'y Gen.Fla. 072-162 and 073-178. The legislature responded in 1974 by amending section 125.01(1)(q) and (r), by substituting "municipal service

taxing or benefit units" for "special purpose districts." In addition, the legislature added new subsections (5) and (6). Chap. 74-191, § 1 Laws of Florida. The changes, in part, were as follows:

> (q) Establish, and subsequently merge or abolish those created hereunder, ~~special purpose districts~~ *municipal service taxing or benefit units* for any part or all of the unincorporated area of the county, within which may be provided fire protection, law enforcement, beach erosion control, recreation *service and* facilities, water, streets, sidewalks, street lighting, garbage and trash collection and disposal, waste and sewage collection and disposal, drainage, *transportation* and other essential facilities and *municipal* services from funds derived from service charges, special assessments, or taxes within such ~~district~~ *unit* only. *It is hereby declared to be the intent of the Legislature that this paragraph is the authorization for all counties to levy additional taxes within the limits fixed for municipal purposes within such municipal service taxing units under the authority of the second sentence of Article VII, Section 9(b) of the state constitution.*
>
> (r) Levy and collect taxes, *both for county purposes and for the providing of municipal services within any municipal service taxing unit,* and special assessments, borrow and expend money, and issue bonds, revenue certificates, and other obligations of indebtedness, which power shall be exercised in such manner, and subject to such limitations as may be provided by general law.
>
> 125.01 Powers and duties. – (5)(a) *To the extent not inconsistent with general or special law, the governing body of a county shall have the power to*

> *establish, and subsequently merge or abolish those created hereunder, special districts for any part or all of the county including incorporated areas if the governing body of the incorporated area affected approves such creation by ordinance within which may be provided municipal services and facilities from funds derived from service charges, special assessments, or taxes within such district only. Such ordinance may be subsequently amended by the same procedure as the original enactment. . . .*

The preamble to Chapter 74-191 provides that these changes have the effect of "authorizing the governing body of any county to create municipal services and taxing units in the unincorporated areas and special purpose districts in both unincorporated and incorporated areas of the county under certain circumstances" and "authorizing the governing body of the county to levy ad valorem taxes within certain municipal service taxing and benefit units under certain circumstances. . . . "

Despite an expression of legislative intent in section 125.01(1)(q) to the effect that the legislation was enacted to extend taxing power under the second sentence of Article VII § 9(b), the Attorney General later opined that these units must be evaluated on the basis of their functions, not titles, and that referenda were nonetheless required in the absence of a statutory directive to the contrary. Op.Att'y Gen.Fla. 075-24. *Gallant v. Stephens*, 358 So.2d at 538. In 1975, the Legislature added the last sentence of the present section 125.01(1)(r) to provide specifically that referenda were not required. Chapter 75-63, § 1, Laws of Florida. Chapter 75-63 reveals the following express legislative intent:

WHEREAS, Chapter 74-191, Laws of Florida, intended to amend section 125.01(1)(q) and (r), Florida Statutes, to grant to all counties the home rule power flexibility to isolate the burden of ad valorem taxes levied for the furnishing of municipal services within the limits fixed for municipal purposes on those areas receiving the benefit of such municipal services, and

WHEREAS, the attorney general, in his opinion number 075-24, dated February 5, 1975, failed to recognize the constitutional distinction between a special district and a municipal service taxing unit created as a taxing vehicle to grant to all counties the taxing flexibility to levy ad valorem taxes within the limits fixed for municipal purposes for the furnishing of municipal services within those areas receiving the benefit of such municipal services and construed Chapter 74-191, Laws of Florida, to require a referendum of the electors within a municipal service taxing unit prior to the levy of ad valorem taxes for the municipal services furnished; and defeated the intent of the legislature in enacting Chapter 74-191, Laws of Florida, to provide home rule power for all counties to address and solve the controversy of double taxation between residents of the incorporated and unincorporated areas, and

WHEREAS, the legislature hereby affirms the will of the people in adopting the State Constitution of 1968 that ad valorem taxes shall not be levied in excess of 10 mills for county purposes and 10 mills for municipal purposes, and that property situate within municipalities shall not be subject to taxation for services rendered by the county exclusively for the benefit of the

property or residents in unincorporated areas, and

WHEREAS, the Legislature declares that the granting of the power to all counties to levy taxes within the unincorporated areas without a referendum for municipal services furnished is within the constitutional protection of such millage limitation; is within the constitutional power of all counties to levy ad valorem taxes; and is in recognition of the existing and potential inequality of placing the tax burden of municipal services furnished to residents in the unincorporated areas on all residents of a county. . . .

In 1987, paragraph q of subsection (1) of section 125.01 was amended to add sub-subparagraph 2. and 3. (See Appendix A, this opinion). According to the preamble of Chapter 87-263, the amendment authorized "counties to establish municipal services taxing units which include municipalities or portions thereof to provide fire control and rescue services," and authorized "the levy of charges, assessments, or taxes therein." The amendment also provided "procedures for removal of a municipality or a portion thereof from such unit. . . . "[12]

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[12] Though admittedly not applicable to this appeal, paragraph (q) of subsection (1) of section 125.01, Florida Statutes, was again amended in 1991, deleting sub-subparagraphs 2. and 3. and providing that section 125.01(1)(q) shall now read:

(q)4. Establish, and subsequently merge or abolish those created hereunder, municipal service taxing or benefit units for any part or all of the unincorporated area of the county, within which may be provided fire

Dryden argues that to accept the County's argument that section 125.01(1)(r) grants to the County the authority to levy special assessments to provide municipal services in cities without municipal consent, absent the existence of an inconsistent municipal ordinance, means that the Legislature enacted a large quantity of needless, useless, and unnecessary legislation in enacting section 125.01(1)(q)1. and 2. and section 125.01(5), and that the requirements of these statutes become meaningless.

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protection, law enforcement, beach erosion control, recreation service and facilities, water, streets, sidewalks, street lighting, garbage and trash collection and disposal, waste and sewage collection and disposal, drainage, transportation, indigent health care services, mental health care services, and other essential facilities and municipal services from funds derived from service charges, special assessments, or taxes within such unit only. *Subject to the consent by ordinance of the governing body of the affected municipality given either annually or for a term of years, the boundaries of a municipal service taxing or benefit unit may include all or part of the boundaries of a municipality in addition to all or part of the unincorporated areas. If ad valorem taxes are levied to provide essential facilities and municipal services within the unit, the millage levied on any parcel of property for municipal purposes by all municipal service taxing units and the municipality may not exceed 10 mills.* ~~It is declared to be the intent of the Legislature that~~This paragraph *authorizes* ~~is the authorization for~~ all counties to levy additional taxes, within the limits fixed for municipal purposes, within such municipal service taxing units under the authority of the second sentence of s 9(b), Art. VII of the State Constitution. Ch. 91-238, Laws of Florida.

In the proceeding below, the trial court accepted Dryden's argument that the more specific statutes, section 125.01(1)(q) 1. and 2. and section 125.01(5), were enacted subsequent to the more general statute, section 125.01(r), and that they control. Further, when the statutes are read in pari materia, section 125.01(1)(r) permits counties to levy special assessments subject to limitations provided in general law, and that the Legislature set forth such general law limitations in section 125.01(1)(q)1. and 2. and section 125.01(5).

In response, the County argues that the primary function of section 125.01(1)(q) is to provide for the creation of an MSTU funding mechanism to authorize counties to levy additional ad valorem taxes within the Florida Constitution's municipal-purposes millage limitation. Article VII § 9(b) of the Florida Constitution provides that in addition to the 10 mill county- purpose millage, counties may be authorized to levy ad valorem taxes for municipal purposes. The County contends that this municipal purpose millage authority for counties has been implemented by the Legislature through the adoption of section 125.01(1)(q), providing for the creation of municipal service taxing units by counties.

According to the County, MSTUs are funding mechanisms by which a county can provide a particular service from a levy of ad valorem taxes, not county-wide but within all or a portion of the unincorporated areas, and with the adoption of the amendment in 1991, within any part of a municipality with municipal agreement. In short, MSTUs are tax equity tools available to counties to place the burden of ad valorem taxes upon a geographic area less than county-wide to fund a particular service.

The County is emphatic that section 125.01(1)(q)2. is not a restriction on the County's power to impose special assessments. The County urges this court to rule upon and reject the trial court's conclusion that section 125.01(1)(q)2. is the exclusive method counties may use to impose special assessments within municipalities. To reach this issue, the County requests this court to overlook the imprecise nomenclature of the ordinances and their mistaken reliance on inapplicable statutory provisions, and to rule that the County could impose the special assessments pursuant to section 125.01(1)(r).

We are unable to accept the County's proposed resolution of this controversy. We cannot overlook the fact that the County referenced section 125.01(1)(q) as the enabling legislation for its ordinances, or that the County totally failed to comply with the terms of that statute. As set forth by the trial court in its final judgment, quoted earlier in this opinion, the County's departure from the provisions of section 125.01(1)(q) cited in the ordinances was material and substantial. Failure to comply with the statute referenced in the ordinances as the authority therefor is critical. For special assessments to be valid and enforceable they must be made pursuant to legislative authority, and the method prescribed by the legislature must be substantially followed. *City of Coral Gables v. Coral Gables*, 119 Fla. 30, 160 So. 476, 478 (1935); *see also* 48 Fla.Jur.2d Special Assessments § 34 (1984) (whether the proceedings imposing the special assessment are under general statutory authority or are carried out pursuant to charter provision or other authorization, there must be substantial compliance with the terms of the authority).

For this reason, the County is incorrect that it does not matter that the County referenced the wrong statute in its ordinances. To uphold the validity of ordinances imposing special assessments based upon authority not cited in the ordinances, when the County totally failed to comply with the authority referenced in the ordinances, would undermine the requirements stated in the above-mentioned authorities. The case of *City of Boca Raton v. State*, 595 So.2d 25 (Fla.1992), relied upon by the County, does not compel a different result. The statutes involved in *City of Boca Raton*, section 166.021, Florida Statutes and Chapter 170, contain markedly different language than section 125.01. More importantly, there appears to have been no issue in that case that the City of Boca Raton attempted to proceed under Chapter 170 to impose its special assessments, failed to comply with the requirements of Chapter 170, and then attempted to save its special assessments by declaring that it could levy the assessments under section 166.021.

Because of our conclusion that these ordinances imposing special assessments are null and void for failure of the County to substantially comply with the statutory authority under which it purported to act, we do not reach the further issue raised by the County, that is, whether section 125.01(1)(q) 2. is the exclusive means by which the County may impose special assessments within municipalities, or whether section 125.01(1)(r) grants counties the broad home rule power to impose special

assessments county-wide unless affected cities opt out by passing inconsistent legislation.[13]

We have briefly, but by no means exhaustively, outlined the legislative history of the pertinent provisions of section 125.01 to illustrate that this statute, and its legislative history, do not conclusively answer the question of the authority of counties to impose special assessments within municipalities, nor does the body of case law cited by the parties.[14] That experienced lawyers, who have argued cases on the meaning of these statutes and the constitutional provisions for several years – one nearly a quarter of a century ago – argue so vehemently such divergent interpretations of these statutes, is testament to their confusing message and the need for legislative action. In that vein, it is fundamentally a *legislative* task to define intergovernmental relationships between cities and counties. We are aware that the legislature, in Chapter 91-238, Laws of Florida, substantially amended section 125.01(1)(q). However, since the amended version is not involved in the case before us, and the parties make

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[13] Because the County's argument places the onus upon cities to go to the expense of legislating in order to opt out of a county-wide assessment, rather than giving cities the sovereign right to opt-in, we do not think it is appropriate for this court to address this issue without argument on behalf of the affected cities.

[14] *City of Boca Raton v. State*, 595 So.2d 25 (Fla.1992); *Seminole County v. City of Casselberry*, 541 So.2d 666 (Fla. 5th DCA 1989); *City of Ormond Beach v. County of Volusia*, 535 So.2d 302 (Fla. 5th DCA 1988); *Taylor v. Lee County*, 498 So.2d 424 (Fla.1986); *Gallant v. Stephens*, 358 So.2d 536 (Fla.1978); and *State ex rel. Dade County v. Dickinson*, 230 So.2d 130 (Fla.1969).

no representation that the amendments resolve the questions presented by the earlier statutes, we decline to venture any interpretation of the amendment.

II.

Next, we address the trial court's conclusion that the charges levied by the County were not special assessments, but taxes for the general benefit of the County, and that, therefore, they violated general law and the constitutional homestead provisions which prohibit any levies, other than special assessments, to alter the homestead protection.

In *City of Boca Raton v. State, supra,* the Florida Supreme Court explained the two requirements for the imposition of a valid special assessment: (1) the property assessed must derive a special benefit from the service provided; and (2) the assessment must be fairly and reasonably apportioned among the properties that receive this special benefit. In the case before us, the court ruled that the special assessment did not meet the special benefit test; the court did not reach the fair apportionment test.

The County contends that the trial judge's determination that these ordinances did not confer a special benefit as a matter of law is clearly erroneous, pointing out that several other courts have held that special assessments for fire protection, garbage collection, erosion control, sewer improvements and street improvements constitute valid special assessments. *Charlotte County v. Fiske,* 350 So.2d 578 (Fla. 2d DCA 1977); *Bodner v. City of Coral Gables,* 245 So.2d 250 (Fla.1971); *City of Hallandale v.*

Meekins, 237 So.2d 318 (Fla. 4th DCA 1970), *aff'd*, 245 So.2d 253 (Fla.1971); *Fire Dist. No. 1 of Polk County v. Jenkins*, 221 So.2d 740 (Fla.1969); and *City of Treasure Island v. Strong*, 215 So.2d 473 (Fla.1968).

Appellees' dispute that the assessments in question provide special benefits to the assessed property. Dryden contends that they are some form of an attempted proprietary charge or service charge, and that they are an attempt to levy a tax in such manner as to circumvent the homestead tax exemptions provided for in the constitution, Article X § 4 and Article VII, § 6. Appellee Foxx goes further, arguing that the law of special assessments arose to provide a means for funding capital improvements and was never meant to permit a lien on homestead property for mere provision of services. Foxx urges us to rule that it is unconstitutional to allow a special assessment for mere services, and then to allow a lien to be placed against homestead property for failure to pay such assessment.

It is our view that the issue in this case – whether these alleged special assessments confer special benefits upon the property assessed – presents mixed questions of law and fact. *See e.g. South Trail Fire Control Dist. Sarasota County v. State*, 273 So.2d 380, 383 (Fla.1973). Because this issue was, in part, a question of fact, and the pleadings, depositions on file, and the affidavits, do not demonstrate an absence of material issues of fact, the trial court's determination that these charges were not special assessments was premature. Regarding appellee Foxx's contention that special assessments may not be used to fund services, but only capital improvements, we note that a similar argument was considered and rejected by the

court in *Charlotte County v. Fiske*, 350 So.2d 578, 580 (Fla. 2d DCA 1977). Moreover, we cannot overlook the considerable Florida case law that has permitted the imposition of special assessments, even when no capital improvements were involved. *See e.g. South Trail Fire Central Dist., Sarasota County v. State*, 273 So.2d 380 (Fla.1973); *First Dist. No. 1 of Polk County v. Jenkins*, 221 So.2d 740 (Fla.1969).

In view of our holding that the ordinances imposing the special assessments are null and void, we decline to reach the further constitutional issue raised by appellee Foxx – that it is unconstitutional to take away a homestead from an indigent homesteader based upon foreclosure of a special assessment lien – because this issue is not ripe for our consideration.

III.

Turning to the trial court's order requiring a refund of the special assessment dollars paid by Madison County residents, the County contends that it acted in good faith, and that there will be a tremendous impact on the County Treasury if refunds are ordered. At the very least, the County argues that summary judgment was premature on this issue and asks that the cause be remanded for further proceedings.

Upon examination of the case law on the subject, *Gulesian v. Dade County School Board*, 281 So.2d 325 (Fla.1973) and *Coe v. Broward County*, 358 So.2d 214 (Fla. 4th DCA 1978), it is our view that many factual and legal issues remain to be considered before deciding the refund issue, and it was inappropriate for the trial court to

determine this issue summarily as a matter of law. In addition to the issue of whether the County acted in good faith, there remain unanswered questions whether a refund is fiscally possible for Madison County, and whether the cost of processing such refunds would be prohibitive.

IV.

Finally, we address Foxx's claim that the trial court erred in dismissing his cause of action pursuant to 42 U.S.C. § 1983. Foxx states that the purpose of a section 1983 claim is to provide a vehicle to challenge excessive governmental action. Foxx contends that in its final judgment, the trial court found that there were violations of the Fifth and Fourteenth Amendments to the Federal Constitution,[15] and that this finding completely contradicts the trial court's order dismissing count III of Foxx's complaint on the grounds that there was no deprivation of a federal right in this controversy.

The County responds that while Foxx alleged in his complaint that the County threatened his use and enjoyment of his land and deprived him of his civil rights, he failed to allege how the County was presently interfering with his property or how his civil rights were being violated. The County contends that it has taken no action to place a lien or foreclose on Foxx's property. The

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[15] Generally, the exaction of an assessment of benefits against property which there was no power to impose is an unconstitutional taking of property without due process of law. 70A Am.Jur.2d Special Assessments § 11 (1987).

County argues that the trial court's finding in the final judgment regarding federal constitutional violations of the Fifth and Fourteenth Amendments was wholly inappropriate and improper. The County further argues that it was entitled to rely on the court's earlier adjudication dismissing Foxx's civil rights claim. As the result of this reliance, the County offered no additional evidence in support of its position.

At the outset, it is necessary to observe that this issue requires resolution only because of Foxx's efforts to secure attorney's fees under the premise that even though this case has been decided on other grounds, if his section 1983 claim would have been an appropriate basis for relief, he would be entitled to an award of fees under the federal statute. *Maher v. Gagne*, 448 U.S. 122, 132 n. 15, 100 S.Ct. 2570, 2576 n. 15, 65 L.Ed.2d 653 (1980). Having already declared the ordinances imposing special assessments null and void for failure to comply with the enabling legislation referenced in the ordinances, this court would not ordinarily address a further issue regarding the sufficiency of the allegations stating another cause of action. Nevertheless, we find it appropriate to do so in this case.

Upon review of Foxx's allegations of a federal civil rights violation, which we find unnecessary to detail in this opinion, we agree with the County that they were insufficient to state a cause of action. However, we are inclined to agree with Foxx that he should have been given an opportunity to amend his complaint. Dismissal of a complaint with prejudice is a severe sanction which should only be granted when the pleader has failed to state a cause of action and it conclusively appears that

there is no possible way to amend the complaint in order to state a cause of action.

In so ruling, we express no opinion as to the appropriateness of a federal civil rights claim in these circumstances. Upon remand Foxx shall be given another opportunity to state his claim, if he can, at which point the trial court shall address Foxx's further claim for attorney's fees under 42 U.S.C. § 1988.

The summary final judgment is AFFIRMED in part, REVERSED in part, and the cause is REMANDED for further proceedings consistent with this opinion.

BOOTH and MINER, JJ., concur.

APPENDIX A

Article VII § 9(b), Florida Constitution (1968):

> (b) Ad valorem taxes, . . . shall not be levied in excess of the following millages upon the assessed value of real estate and tangible personal property: for all county purposes, ten mills; for all municipal purposes, ten mills; . . . A county furnishing municipal services may, to the extent authorized by law, levy additional taxes within the limits fixed for municipal purposes.

Article VIII § 1(f), Florida Constitution (1968):

> (f) NON-CHARTERED GOVERNMENT. Counties not operating under county charters shall have such power of self-government as is provided by general or special law. The board of county commissioners of a county not operating

under a charter may enact, in a manner prescribed by general law, county ordinances not inconsistent with general or special law, but an ordinance in conflict with a municipal ordinance shall not be effective within the municipality to the extent of such conflict.

Chapter 125.01 Powers and duties. –

(1) The legislative and governing body of a county shall have the power to carry on county government. To the extent not inconsistent with general or special law, this power includes, but is not restricted to, the power to: . . .

(q)1. Establish, and subsequently merge or abolish those created hereunder, municipal service taxing or benefit units for any part or all of the unincorporated area of the county, within which may be provided fire protection, law enforcement, beach erosion control, recreation service and facilities, water, streets, sidewalks, street lighting, garbage and trash collection and disposal, waste and sewage collection and disposal, drainage, transportation, indigent health care services, and other essential facilities and municipal services from funds derived from service charges, special assessments, or taxes within such unit only. It is declared to be the intent of the Legislature that this paragraph is the authorization for all counties to levy additional taxes, within the limits fixed for municipal purposes, within such municipal service taxing units under the authority of the second sentence of s. 9(b), Art. VII of the State Constitution.

2. Establish by ordinance a municipal service taxing unit for any part or all of the unincorporated area of the county and any municipality

within the county or any part thereof, within which may be provided fire control and rescue services from funds derived from service charges, special assessments, or taxes within such unit only. It is declared to be the intent of the Legislature that this subparagraph is the authorization for all counties to levy additional taxes, within the limits fixed for municipal purposes, within such municipal service taxing unit under the authority of the second sentence of s. 9(b), Art. VII of the State Constitution. No municipality or portion thereof shall be included within a municipal service taxing unit established pursuant to this subparagraph unless such inclusion is approved by ordinance of the municipality and by a majority of the electors of the municipality, or the portion thereof affected, voting at a regular or special election. Passage of the required county and municipal ordinances and approval of the affected electors shall be completed, and notice thereof given to the property appraiser, at least 9 months prior to the beginning of the fiscal year for which such a unit is first established. A municipality which is included within a municipal service taxing unit, or any portion of which is so included, may by ordinance remove itself or such portion from the unit. Such an ordinance must be adopted prior to April 1 of any year, to take effect no earlier than October 1 of the following calendar year. This subparagraph shall not be construed to prohibit a municipality from continuing in, or entering into, service contracts with a county or a municipal service taxing unit for the purpose of providing fire control and rescue services.

3. The total millage for municipal purposes imposed within a municipal service taxing unit shall not exceed 10 mills.

(r) Levy and collect taxes, both for county purposes and for the providing of municipal services within any municipal service taxing unit, and special assessments; borrow and expend money; and issue bonds, revenue certificates, and other obligations of indebtedness, which power shall be exercised in such manner, and subject to such limitations, as may be provided by general law. There shall be no referendum required for the levy by a county of ad valorem taxes, both for county purposes and for the providing of municipal services within any municipal service taxing unit.

* * *

(3)(b) The provisions of this section shall be liberally construed in order to effectively carry out the purpose of this section and to secure for the counties the broad exercise of home rule powers authorized by the State Constitution.

* * *

(5)(a) To an extent not inconsistent with general or special law, the governing body of a county shall have the power to establish, and subsequently merge or abolish those created hereunder, special districts to include both incorporated and unincorporated areas subject to the approval of the governing body of the incorporated area affected, within which may be provided municipal services and facilities from funds derived from service charges, special assessments, or taxes within such district only. . . .

* * *

(c) It is declared to be the intent of the Legislature that this subsection is the authorization for the levy by a special district of any millage designated in the ordinance creating such a special district or amendment thereto and approved by vote of the electors under the authority of the first sentence of s. 9(b), Art. VII of the State Constitution. It is the further intent of the Legislature that a special district created under this subsection include both unincorporated and incorporated areas of a county and that such special district may not be used to provide services in the unincorporated area only.

* * *

125.0101 County may contract to provide services to municipalities and special districts. –

(2) In addition to the powers enumerated in this chapter, the legislative and governing body of a county shall have the power to contract with a municipality or special district within the county for fire protection, law enforcement, library services and facilities, beach erosion control, recreation services and facilities, water, streets, sidewalks, street lighting, garbage and trash collection and disposal, waste and sewage collection and disposal, drainage, transportation, and other essential facilities and municipal services. Such services shall be funded as agreed upon between the county and the municipality or special district.

This section shall not be construed to authorize the county to impose any service charge or special assessment or to levy any tax within the municipality or special district, nor shall this

section be construed to authorize the creation of a municipal service taxing unit within such area.

IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT, IN AND FOR MADISON COUNTY, FLORIDA.

FL BAR ID #0047019

WILEY D. FOXX, Plaintiff, vs. MADISON COUNTY, a political Subdivision of the State of Florida, and WES KELLY, in his official capacity as Tax Collector, Madison County, Florida, Defendants,	CASE NO. 90-161-CA
and QUINTON DRYDEN, BETTY R. VAN, et al., Plaintiffs, vs. MADISON COUNTY, a Political Subdivision of the State of Florida, and WES KELLY, as the Tax Collector for Madison County, Florida, Defendants.	CASE NO. 90-198-CA

FINAL JUDGMENT

THIS CAUSE, came on to be heard upon motions for summary judgment filed herein by the Plaintiffs. The parties have submitted extensive briefs and documents

have been received by the Court and agreed to by the parties as being true copies of the documents involved. Included in such documents are Madison County Ordinances 89-26, 89-27, 89-28 and 89-29, and Madison County Ordinances 33, 34, 35 and 36; copies of Inter-Local Agreements; copies of resolutions adopted by various cities in Madison County; and copies of certain municipal ordinances which have been filed with the Court. Having reviewed and considered all the depositions and documents including affidavits filed in opposition to the motions for summary judgment, considered the briefs filed by the respective parties, and having heard extensive oral arguments on the issues involved, the Court is of the opinion that the material and pertinent facts are not in dispute and that there exists no genuine issue as to any material fact and that the Plaintiffs are entitled to the entry of a final judgment as a matter of law.

The Court hereby finds as follows:

FINDINGS OF FACT

1. The Defendant, Madison County, Florida, levied certain charges characterized as special assessments against property located within Madison County pursuant to Madison County Ordinances 89-26, 89-27, 89-28 and 89-29, which said ordinances purported to levy such charges for garbage collection and disposal, landfill closure, ambulance service, and fire protection. Said ordinances were adopted on August 17, 1989, and purported to levy such charges effective retroactive to January 1, 1989.

2. On May 7, 1990, Plaintiff FOXX filed suit and on June 6, 1990, Plaintiffs DRYDEN, et al., filed a class action suit in Madison County Circuit Court challenging the validity of said ordinances and contending that same were unauthorized and that the charges levied therein were not in fact special assessments as such term is used in the Florida Constitution in Article X, Section 4 and Article VII, Section 6. A preliminary injunction was granted in the FOXX case on May 25, 1990 and the two cases were consolidated by Court order on July 13, 1990. On January 3, 1991, this Court entered its order certifying the suit of Plaintiffs DRYDEN, et al., as a proper class action suit.

3. On July 18, 1990, the Defendant Madison County enacted Ordinances 33, 34, 35, and 36, each of which amended one of the 1989 ordinances and each of which purported to levy non-ad valorem assessments or special assessments for the year 1990.

4. On December 6, 1989, Madison County adopted a resolution purporting to advise that Madison County intended to use the non-ad valorem collection method for collection of the charges provided for in the 1989 ordinances for year 1990 which such resolution fixed the boundaries within which the charges were to be levied which such boundaries constituted the entire area of Madison County including the jurisdictional boundaries of the three cities of Lee, Madison, and Greenville.

5. On October 3, 1989, the City of Madison adopted a resolution, Resolution 89-6, in accordance with the resolution adopted by Madison County concurring in the creation of a municipal service taxing or benefit unit

within the City of Madison, which such resolution by its terms was conditioned upon the concurrence in the creation of such unit by the other two affected cities, the City of Greenville and the City of Lee.

6. On April 3, 1990, the City of Greenville adopted a resolution similar to that adopted by the City of Madison concurring in the creation of the district and that resolution was also conditioned upon the concurrence of all the three affected cities.

7. The City of Lee never adopted a resolution concurring in the creation of the district both within the unincorporated areas of the County and within the jurisdictional boundaries of the three cities.

8. The MSTU or MSBU whose boundaries were set forth in the December 6, 1989 resolution adopted by Madison County never came into existence because it was never approved by all of the affected cities.

9. Madison County never complied with the provisions of Section 125.01(5), F.S., because approval of the governing bodies of all the affected incorporated areas, (the City of Greenville, the City of Madison, and the City of Lee), was never obtained. Only the City of Madison adopted a resolution prior to January 1, 1990, the City of Lee never adopted a resolution, and although the City of Greenville did adopt a resolution it was not timely in that it was not adopted until April 3, 1990, and both of the resolutions adopted by the two cities expressly provided that the approval was a conditional approval conditioned upon the approval of all affected cities.

10. Madison County did not comply with the provisions of Section 125.01(1)(q)2, F.S. (1987), by virtue of the fact that the required county and municipal ordinances and approval of the affected electorate was not completed and notice thereof given to the Property Appraiser at least 9 months prior to the beginning of the fiscal year for which such a unit is first established, and never complied with the statute because approval was never done by a majority of the electors of the municipality or the portion thereof affected for either the 1989 levies or the 1990 levies.

11. None of the 1989 ordinances created a municipal services taxing or benefit unit. Although the County resolution adopted December 6, 1989, makes reference to previously created municipal service taxing or benefit units, none were created by the 1989 ordinances. The 1990 ordinances which amend the 1989 ordinances purport to create MSTU/MSBU/special districts.

12. The Plaintiffs DRYDEN, et al., in case no. 90-198-CA, have the right to maintain this suit as a class action and by previous order this Court has ruled that said Plaintiffs can properly maintain this suit as a class action and two persons have been designated as proper representatives to represent the class.

CONCLUSIONS OF LAW

1. Section 125.01(1)(q)2, F.S. (1987), provided the authority for a county to establish by ordinance a municipal service taxing unit for any part or all of the unincorporated area of the county and any municipality within the county or any part thereof, within which may be

provided fire control and rescue services from funds derived from service charges, special assessments or taxes within such unit only, subject to the conditions set forth in the statute that no municipality or portion thereof shall be included within such unit unless such inclusion is approved by ordinance of the municipality and by a majority of the electors of the municipality or the portion thereof affected, voting at a regular or special election. The statute further required as a condition prerequisite that all the required county or municipal ordinances and approval of the affected electors shall be completed at least 9 months prior to the beginning of the fiscal year for which such a unit is first established, and notice thereof given to the Property Appraiser. It is undisputed that none of the conditions set forth in this statute were complied with for the levies made pursuant to the 1989 or 1990 ordinances.

Furthermore, this statute only allowed such a municipal service taxing unit to be created for providing fire control and rescue services and the County ordinances for 1989 and 1990 authorized a levy for fire protection, ambulance service, garbage collection and disposal, and landfill closure. Assuming that the term "rescue services" as used in the statute includes ambulance services, two of the four ordinances provided for charges for services not authorized by the statute. Three of the County's 1989 ordinances as amended by the 1990 ordinances are clear that they are intended to apply not only in the unincorporated areas of the county but also within the cities. The ordinance for fire protection is the only ordinance that purports to levy a charge solely in the unincorporated

area and it was levied in 1989 pursuant to Section 125.01(1)(q)2, F.S., instead of Section 125.01(1)(q)1, F.S..

This Court finds and holds that since the County failed to comply with the provisions of Section 125.01(1)(q)2, F.S., that the ordinances are illegal, unauthorized, null and void.

The County has argued that in spite of its numerous statutory references contained in the ordinances as a basis for the creation of same, and notwithstanding the fact that all four 1989 ordinances recite that the levies are imposed pursuant to Section 125.01(1)(q)2, F.S., that the County has broad home-rule authority to adopt whatever ordinances or resolutions and to levy whatever charges it deems fit notwithstanding its failure to comply with the specific statute referenced in the 1989 ordinances, which is referenced with others including Section 125.01(1)(q)2, F.S., in the 1990 ordinances. The County contends that its broad home-rule powers coupled with the authority set forth in Section 125.01(1)(r), F.S. and Section 125.01(3), F.S., authorized it to levy special assessments without creating municipal services taxing units, throughout the County including within the territorial boundaries of municipalities and the Court should disregard the ordinances' statutory references and validate the ordinances and assessments under the home-rule power. It is the Court's opinion that Section 125.01(1)(q)2, F.S., is the controlling statute and that Section 125.01(1)(r), F.S., must be read in para materia with Section 125.01(1)(q)2, and Section 125.01(5), F.S., and other provisions set forth in the statute setting forth the specific procedure which must be followed if the County intends to levy service

charges, special assessments, or taxes within the territorial boundaries of a municipality. The Court is cognizant of the fact that Section 125.01(1)(r), F.S., has its genesis through legislation adopted revising Chapter 125, F.S., in 1971. Since then specific statutes have been created, including Section 125.01(1)(q)1 and 2, F.S., and Section 125.01(5), F.S., which set forth the specific mechanism which counties are required to follow in the levying of service charges, special assessments, and ad valorem taxes; and specific statutory conditions must be met if a county intends to levy service charges, special assessments, or ad valorem taxes within the territorial boundaries of a municipality. Madison County failed to comply with any of the statutory prerequisites necessary for a county to invade the territory of a municipality and impose service charges, special assessments or ad valorem taxes therein. Further, Section 125.01(1)(r), F.S., expressly provides that the authority conferred " . . . shall be exercised in such manner, and subject to such limitations, as may be provided by general law.". Section 125.01(1)(q)1 and 2, and Section 125.01(5), F.S., are all general laws setting forth the required prerequisites and such laws were not complied with. Section 125.01(3), F.S., does not enlarge the specific powers conferred or alter the legislative prerequisites provided for.

The two ordinances as amended providing for garbage collection and disposal and landfill closure are invalid for the additional reason that neither of such are authorized under Section 125.01(1)(q)2, F.S., but even if they were the statutory conditions were not met and they would be illegal and unauthorized for the same reasons as the others.

The County has also contended that the various acts which must occur including approval by resolution of the affected municipalities and by a majority of the electors of the municipality beyond the 9 month time period set forth in Section 125.01(1)(q)2, F.S., only applies if the county intends to levy ad valorem taxes within a municipality and do not apply if the county is levying service charges or special assessments. A reading of the statute clearly rejects such an interpretation. The first sentence of Section 125.01(1)(q)2, F.S., provides:

> Establish by ordinance a municipal service taxing unit for any part or all of the unincorporated area of the county and any municipality within the county or any part thereof, within which may be provided fire control and rescue services from funds derived from *service charges, special assessments,* or *taxes* within such unit only. . . . (e.s.).

It is clear that the creation of the municipal service taxing unit is required whether the county intends to levy service charges, special assessments or taxes, and the conditions which must be met to demonstrate municipal consent apply to all.

The county has argued that it has broad home-rule powers under the Constitution, in Article VIII, Section 1, and that it may do anything unless restricted or preempted by general law. Madison County is a non-charter county as set forth under Article VIII, Section. 1(f), Fla. Const., and it provides that counties not operating under county charters shall have such power of self government as is provided by general or special law. Section 125.01(1), F.S., provides powers to non-charter counties and the

county is required to comply with the statutory prerequisites set forth therein. The county has failed to comply with the statutory procedures set forth by the Legislature and no broad home-rule umbrella of unwritten authority as suggested by the County exists. It is true that the statutory powers granted under Section 125.01, F.S., to non-charter counties are broader than had existed under the 1885 Constitution and Chapter 125, F.S., as it existed prior to 1971 but a non-charter county, a political subdivision of the state has only such powers as are expressly provided by general or special law. Those powers once enumerated by the Legislature are required to be followed by Madison County and Madison County has failed to do so.

2. The County has resisted the motions for summary judgment by filing affidavits of persons claiming to be experts who have stated that in their opinion a special benefit exists flowing to all property subjected to the charges or assessments levied pursuant to the 1989 ordinances as amended by the 1990 ordinances. This Court has reviewed the memorandum and briefs filed on behalf of the parties and concludes that the charges levied pursuant to said ordinances are not special assessments as such terms are used in Article VII, Section 6 and Article X, Section 4, Florida Constitution, as a matter of law.

The Court finds that there is no genuine issue of material fact and that the Plaintiffs are entitled to judgments in their respective cases as a matter of law with regard to the benefits nexus per se in the four 1989 ordinances as amended by the 1990 ordinances. The Court rules as a matter of law that there are general benefits *only* accruing to the entire community and that

no property is specially benefited from the service provided for in said ordinances. That being the case, the ordinances are invalid, and the homestead property owners are entitled to relief under Article X, Section 4 of the Florida Constitution and Article VII, Section 6, supra. All property owners subject to the special assessments, including the homestead owners, are also entitled to relief under the 5th and 14th Amendments to the United States Constitution as the forced contribution without authority is a taking of property without due process of law or just compensation as well as violating the equivalent provisions in the Florida Constitution, i.e., Article I, Sections 2 and 9.

Article VII, Section 6 and Article X, Section 4, supra, both are intended to provide benefits and protection to the owners of homesteads in Florida. Article VII, Section 6(a), supra, provides:

> Every person who has the legal or equitable title to real estate and maintains thereon the permanent residence of the owner, or another legally or naturally dependent upon the owner, shall be exempt from taxation thereon, except assessments for the special benefits, up to the assessed valuation of five thousand dollars, upon establishment of right thereto in the manner prescribed by law. The real estate may be held by legal or equitable title, by the entireties, jointly, in common, as a condominium, or indirectly by stock ownership or membership representing the owner's or member's proprietary interest in a corporation owning a fee or a leasehold initially in excess of ninety-eight years.

Article X, Section 4, supra, is also a provision dealing with homestead intended to protect the homestead from forced sale for debt. These two provisions which are a fundamental part of the Florida Constitution and were also part of the 1885 Constitution as amended in part indicate quite clearly the intent of the will of the people of the State of Florida to protect a person's home from any form of debt and to provide tax benefits in the form of an exemption from taxes up to the value of $25,000.00. All of the charges levied by Madison County pursuant to the 1989 ordinances as amended by the 1990 ordinances could have been financed through the assessment and collection of ad valorem taxes but this would have meant that the owners of homestead property would receive the benefit of the $25,000.00 homestead exemption. It is clear that the County's levies pursuant to the ordinances evince or are an attempt to circumvent the homestead tax exemption provided in the Constitution. To avoid the constitutional homestead protection, the County characterizes the levies made pursuant to the ordinances as "special assessments" and "non-ad valorem assessments" since the Constitution permits the imposition of special assessments against homestead property. It is the Court's ruling that the charges levied actually provide only a general benefit to the community and property throughout the County as a matter of law as opposed to a special benefit to any particular property and accordingly the charges are not special assessments or assessments for special benefits as that term is used in the Constitution. As fixed by the ordinances the charges are nothing more

than an *annual charge* made to defray the cost of a particular expense incurred by the county in providing a particular service and no particular property is specially benefited. Although the charges vary depending on the class of property there is no doubt but that the purpose of the attempted levy in this manner is to circumvent the $25,000.00 homestead exemption provided in the Constitution. It is also clear that the purpose of utilizing the non-ad valorem collection methodology provided for in Section 197.3631, F.S., is so that the charges can become a lien against the homestead and collected through the sale of a tax certificate in the same manner as ad valorem taxes. This subjects the homestead to the possibility of forfeiture directly contrary to the provisions of Article X, Section 4, supra, which is expressly referred to in the definition of "non-ad valorem assessment" set forth in Section 197.3631(1)(d), F.S.. Since the charges are not non-ad valorem assessments, special assessments, or assessments for special benefits, the non-ad valorem collection method could not be used. The homestead is constitutionally protected from debt.

The Florida Courts have ruled on several occasions that certain attempted levies were not special assessments. In the case of *Whisnant v. Stringfellow*, 50 So.2d 885 (Fla. 1951), the Supreme Court held that a county health unit could not be the subject of a special assessment because a health unit provides benefits to all people not to property, non-owners of property as well as property owners: A similar conclusion was reached by the Supreme Court in the case of *Crowder v. Phillips*, 1 So.2d 629 (Fla. 1941), where Leon County attempted to finance a hospital through the levy of a special assessment on all

property in Leon County. There is no doubt that a hospital is a benefit but the benefit doesn't flow to the property it benefits people. See *City of Fort Lauderdale v. Carter*, 71 So.2d 260 (Fla. 1954) and *Fisher v. Board of County Commissioners of Dade County*, 84 So.2d 572 (Fla. 1956). In *Turner v. State*, 168 So.2d 192 (Fla. 3 DCA 1964), the Third District Court of Appeal recognized that a charge for garbage collection was for a service rendered and sounded in contract in debt and as a result an ordinance which made failure to pay such charge a misdemeanor providing for imprisonment, violated the Florida constitutional provision, prohibiting imprisonment for non-payment of debt. If an ordinance providing for imprisonment for failure to pay a garbage collection charge was held to violate the Florida Constitution prohibiting imprisonment for debt, then failure to pay the garbage collection charged levied pursuant to the Madison County ordinances must also violate Article X, Section 4, supra, which provides that a homestead property shall not be subject to forfeiture for debt. See Article I, Section 11, Fla. Const., which provides that " . . . no person shall be imprisoned for debt, except in cases of fraud.". Article X, Section 4, supra, provides that there " . . . shall be exempt from forced sale under any process of any court, and no judgment, decree or execution shall be a lien thereon . . . the following property owned by a natural person . . . ", and then references the homestead.

Ambulance service, garbage collection, the operation of landfills and fire protection are certainly legitimate public concerns but they may not be financed through

any mechanism which is inconsistent with the fundamental principles enunciated in the Constitution, guaranteeing homestead protection to property of Florida's citizens.

The Court is well aware of the financial constraints presently existing in local government and throughout Florida but the public needs of public bodies must be met and financed through legitimate means which do not offend any of the fundamental precepts and guarantees insured to citizens by the Florida Constitution.

3. Finding that there is no genuine issue as to any material fact the Court hereby finds and holds that the Plaintiffs' motion for summary judgment should be granted and that Plaintiffs are entitled to the relief prayed for including refund of all monies paid. Inasmuch as the disposition of these issues constitutes a total determination of the merits of all the allegations contained in the complaint and issues raised by the answers, and permanently lays to rest the dispute between the parties, this summary judgment is hereby deemed a final judgment. The Court retains jurisdiction of this cause solely for the purpose of entertaining motions to tax costs and fixing the amount of attorney's fees prayed for pursuant to the class action, and for the purpose of entering such further orders as may be necessary and proper for the complete exercise of this Court's jurisdiction.

4. A stay is hereby ordered on refunds of affected property owners pending expiration of the appeal time.

DONE AND ORDERED at Madison, Madison County, Florida, this 25th Day of November, 1991.

/s/ John W. Peach
JOHN W. PEACH,
Circuit Judge

Copies furnished to: COPY

Toby Buel, Esquire
Three Rivers Legal Services, Inc.
817 West Duval Street
Lake City, Florida 32055
Attorney for Plaintiff Foxx

Larry E. Levy, Esquire
Post Office Box 10583
Tallahassee, Florida 32302
Attorney for Plaintiffs Dryden, et al.

Edwin B. Browning, Jr., Esquire
Davis, Browning & Schnitker
Post Office Drawer 652
Madison, Florida 32340

Ken van Assenderp, Esquire
Young, van Assenderp, Varnadoe & Benton
Post Office Box 1833
Tallahassee, Florida 32302
Attorney for Defendants

Joseph C. Mellichamp, III
Chief, Tax Section
Department of Legal Affairs
The Capitol – Tax Section
Tallahassee, Florida 32399-1050

Copies mailed this 25th Day of November, 1991. By: /s/ Cathy Hall
Judicial Assistant

SUPREME COURT OF FLORIDA

WEDNESDAY, JULY 9, 1997

QUINTON DRYDEN, et al.,	*	
Petitioners,	*	CASE NO. 87,594
v.	*	District Court of Appeal,
MADISON COUNTY, FLORIDA,	*	1st District – Nos. 95-466 95-978
Respondent.	*	

****

Petitioners' Motion for Rehearing filed in the above cause is hereby denied.

KOGAN, C.J., OVERTON, SHAW, GRIMES, HARDING and ANSTEAD, JJ., concur

WELLS, J., dissents

TC

cc: Hon. Jon S. Wheeler, Clerk
Hon. Tim Sanders, Clerk
Hon. John W. Peach, Judge

Mr. Larry E. Levy
Mr. Loren E. Levy
Mr. George T. Reeves
Mr. Edwin B. Browning, Jr.
Mr. Ken Van Assenderp
Mr. Joseph C. Mellichamp, III
Mr. Thomas P. Crapps
Mr. Eric J. Taylor
Mr. Keith C. Hetrick
Mr. Robert M. Rhodes
Ms. Victoria L. Weber

A True Copy

TEST

(SEAL)

/s/ Sid J. White
Sid J. White
Clerk, Supreme Court

Mr. Robert L. Nabors
Ms. Virginia Saunders
Delegal
Mr. Herbert W. A. Thiele
Mr. Sanford A. Minkoff
Mr. Daniel C. Brown
Mr. William J. Roberts

Supreme Court, U.S.
FILED
MAY 21 1999
CLERK

(2)

No. 98-1691

IN THE

Supreme Court of the United States

QUINTON DRYDEN, *et al.*,

Petitioners,

v.

MADISON COUNTY, FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

RESPONDENT'S BRIEF IN OPPOSITION

KEN VAN ASSENDERP
YOUNG, VAN ASSENDERP
& VARNADOE, P.A.
P.O. Box 1833
Tallahassee, Florida 32303-1833
(850) 222-7206

GEORGE T. REEVES
Counsel of Record
E. BAILEY BROWNING, III
DAVIS, BROWNING
& SCHNITKER, P.A.
P.O. Drawer 652
Madison, Florida 32341
(850) 973-4186

Attorneys for Respondent

152933

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

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STATEMENT OF THE CASE AND FACTS

The facts and statement of the case are partially stated in the Petitioners' Statements of the Case and Facts. However, Respondent wishes to bring to this Court's attention certain facts and the posture of this case which were not presented by Petitioner, and need to be disclosed in the interest of clarity. To lessen confusion, Respondent, in its Brief in Opposition, will cite to the Appendix of the Petition for Writ of Certiorari. (App. __).

This case was originally decided in favor of the Petitioners by the Trial Judge, who ordered refunds of the special assessments, invalidly levied by county ordinance, for all years involved. (App. 102a-117a). Respondents appealed to the First District Court of Appeal, whereupon, in *Madison County v. Foxx*, 636 So.2d 39 (Fla. 1st DCA 1994) (App. 68a-101a) that court affirmed the Trial Judge's Order in part, but reversed in part. In its opinion, the District Court affirmed that the special assessments were procedurally invalid. (App. 88a-90a). The District Court also reversed the order of the Trial Judge who had ordered a refund of the special assessments, remanding the refund issue for further proceedings, consistent with the Florida Supreme Court's opinion in *Gulesian v. Dade County School Bd.*, 281 So.2d 325 (Fla. 1973) (App. 93a-94a) *Gulesian* allows the court to deny refunds of levies, which are ruled illegal or void, if the court finds the levying body acted in good faith.

The District Court determined that there remained factual and legal issues which should be decided by the Trial Judge regarding refunds in this cause. It identified several unanswered questions which relate to the determination of

refunds, including whether Respondents acted in good faith, whether a refund was fiscally possible for Respondents and whether the cost of processing such refunds would be unreasonably onerous. (App. 93a-94a). The Petitioners never cited *McKesson v. Div. of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990) to the court except in their petition for rehearing. The court denied the petition for rehearing. This is not surprising, as Florida courts will not entertain additional authorities for the first time on rehearing. *Cartree v. HRS*, 354 So.2d 81 (Fla. 1st DCA 1977) The Petitioners did not attempt to appeal this decision. However, the Respondents deny that *McKesson* is applicable in any event.

On remand, the Trial Judge determined to allow refunds of the special assessments collected for the years 1991, 1992, and 1993, but decided that because Respondent acted "within the good faith parameters of *Gulesian*," the Petitioners were not entitled to refunds of the special assessments collected for 1989 and 1990. (App. 50a-51a). Not content with this semi-victory, the Petitioners decided to appeal this second Order of the Trial Judge.

Also, the Trial Judge heard testimony that the fiscal impact of a refund would be great and the cost of a refund to Respondent would be of tremendous economic impact on the citizens of Madison County, because of the expense estimated at amounts from $54,000 to $153,000. (App. 60a-61a).

The First District Court of Appeal once again heard argument in this case. The District Court issued its ruling on these issues in *Dryden v. Madison County*, 672 So.2d 840 (Fla. 1st DCA 1996) (App. 33a-41a).

In its opinion the District Court found that the Trial Judge's determination that the Respondent acted "within the good faith parameters of *Gulesian*" was based upon its finding that the Respondent's actions were founded upon information obtained from the State Association of County Commissioners meetings and "expert" outside counsel who helped draft the state legislation on special assessments. (App. 37a). The District Court found that the Trial Judge's conclusion that the Respondent acted in good faith was supported by substantial competent evidence. (App. 38a-39a).

The District Court then considered the assertion by the Petitioners that the Florida Supreme Court's decision in *Gulesian* had been overruled by this Court's decision in *McKesson v. Div. of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990). The District Court rejected this contention stating that the special assessments were:

> . . . invalidated for failure to follow statutory procedures, and did not involve a violation of the United States Constitution. Thus, the requirements of the United States Supreme Court concerning meaningful remedies are inapplicable in this case.

(App. 39a).

Upon appeal to the Florida Supreme Court, that court affirmed the opinion of the First District Court of Appeal. (App. 18a-32a). It, like all the courts to hear this case before, found no impediment in the United States or Florida Constitutions to denying refunds of the special assessments collected before the trial court initially ruled. (App. 21a-22a).

The Florida Supreme Court's opinion in the instant case properly addresses Federal due process principles:

> Where an invalid tax scheme discriminates among citizens without a legal basis and bestows no commensurate benefit, a refund may be in order. *Department of Revenue v. Kuhnlein*, 646 So.2d 717 (Fla. 1994). Otherwise, the tax could constitute an unlawful taking of property in violation of state and federal rights. *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990). Where an invalid tax scheme applies across the board and confers a commensurate benefit, on the other hand, "equitable considerations" may preclude a refund. *Gulesian v. Dade County School Bd.*, 281 So.2d 325 (Fla. 1973).
>
> In the present case, the 1989 and 1990 assessments fall in the latter category. The assessments were non-discriminatory (i.e., they applied across the board to all property owners in the county) and they conferred a commensurate benefit (i.e. they provided garbage collection and disposal, landfill closure, ambulance service, and fire protection). Further the county acted in good faith in imposing these assessments.

(App. 21a-22a).

In response to the Florida Supreme Court's ruling, the Petitioners filed a Petition for Writ of Certiorari to this Court which was summarily granted. (App. 16a-17a). This order

merely provided that the case was "remanded to the Supreme Court of Florida for further consideration in light of *Newsweek, Inc. v. Florida Department of Revenue*, 522 U.S. __ (1998)." (App. 16a-17a). The Newsweek case is further referenced herein as *Newsweek, Inc. v. Florida Department of Revenue*, 118 S. Ct. 904 (1998).

The Florida Supreme Court reconsidered its opinion in light of *Newsweek, supra*, in its January 21, 1999 opinion. (App. 1a-15a). In *Newsweek*, the state courts denied Newsweek a refund of taxes it had paid in reliance on the availability of a post payment refund should the taxes be ruled unconstitutional. The state court determined that Newsweek should have availed itself of the prepayment remedy which was also available pursuant to section 72.011 Florida Statutes. (App. 3a). The Court held that the state could not deny the taxpayer a postpayment remedy when the taxpayer paid the taxes in question in reliance on the availability of such remedy. (App. 4a).

The Florida Supreme Court found this to be totally inapplicable to the instant case. (App. 4a). In *Newsweek*, the courts ruled that the taxpayer could not receive a refund because such refund was procedurally barred. The Florida Supreme Court found no such procedural bar to the refund requested in the instant case. Rather, the court found that under the substantive law the taxpayer was not entitled to a refund. (App. 5a-6a).

REASONS FOR DENYING THE WRIT

I.

THIS COURT'S DECISION IN *NEWSWEEK, INC. v. FLORIDA DEPARTMENT OF REVENUE*, 118 S. Ct. 904 (1998) DOES NOT CHANGE THE EXISTING LAW CONCERNING REFUNDS OF SPECIAL ASSESSMENTS NOR DOES IT MANDATE REFUNDS IN THIS CASE.

In its decision rendered in the case of *Newsweek, Inc., v. Florida Department of Revenue*, 118 S. Ct. 904 (1998) this Court did not change the law existing at the time of the Florida Supreme Court's opinion in the instant case. In *Newsweek,* the petitioner was engaged in the business of selling magazines and had paid its state sales tax on the sale of its magazines. In reaction to the Florida Supreme Court's ruling in *Department of Rev. v. Magazine Pub. of America*, 604 So. 2d 459 (Fla. 1992), the Petitioner applied for a refund of the taxes it had paid. In *Magazine*, the Florida Supreme Court had determined that the State of Florida's sales tax scheme for periodicals, newspapers, magazines and similar publications impermissibly burdened the magazine publisher's rights under the First Amendment of the United States Constitution. *Magazine*, did not address the issue of refunds.

Upon the magazine publisher's application for refund, the Florida Department of Revenue denied the request for refund and the case proceeded to Circuit Court where the trial court entered summary judgement against the magazine publishers. On appeal to the First District Court of Appeal, that court affirmed the grant of summary judgement against

the magazine publishers on the basis that the publishers failed to exercise their right to contest the tax in question prior to paying the tax. *Newsweek Inc. v. Department of Revenue*, 689 So. 2d 361 at 363-364 (Fla. 1st DCA 1997).

The magazine publishers cited *McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990) as authority for the proposition that the state was required to provide meaningful backward looking relief. The First District Court however agreed with the Department of Revenue:

> We agree that *McKesson* is distinguishable because that holding was expressly predicated upon the fact that the taxpayer had no meaningful predeprivation remedy. The Court's holding was that states are obligated to provide a meaningful opportunity to secure post payment relief when a state penalizes the taxpayer for failing to pay first and obtain review of the taxes validity later in a refund action.

Newsweek, 689 So. 2d 361 at 363.

> In the present case, the taxpayer could have availed itself of the predeprivation remedy under section 72.011, Florida Statutes (1987)

Newsweek, 689 So. 2d 361 at 363.

> Thus, the coercive penalties which deprived the taxpayers in *McKesson* of any effective predeprivation remedy are not factors in this case.

Newsweek, 689 So. 2d 361 at 364.

The First District Court affirmed the opinion of the trial court in all respects, and the magazine publishers petitioned for a writ of certiorari to this Court.

In its review of the First District Court's opinion, this Court stated that the First District Court failed to consider the court's decision in *Reich v. Collins*, 513 U.S. 106 (1994). *Newsweek v. Florida Department of Revenue*, 118 S. Ct. 904 at 904. In its discussion of *Reich,* this Court said:

> There, the Georgia Supreme Court had rejected a taxpayer's refund claim filed pursuant to a general refund statute, dismissing any due process concerns because a predeprivation remedy was available. (citations omitted) While assuming the constitutional adequacy of Georgia's predeprivation procedures, we nonetheless reversed because "no reasonable taxpayer would have thought that [the predeprivation procedures] represented, in light of the apparent availability of the refund statute, the *exclusive* remedy for unlawful taxes.(emphasis added) (citations omitted)

Newsweek, 118 S. Ct. 904 at 904-905.

> We emphasized a State "has the flexibility to maintain an exclusively predeprivation remedial scheme, so long as the scheme is 'clear and certain.' " (citations omitted) But a State may not "bait and switch" by "hold[ing] out what plainly appears to be a 'clear and certain' postdeprivation remedy and then declare, only after the disputed taxes are paid, that no such remedy exists."

Newsweek, 118 S. Ct. 904 at 905.

This Court concluded that the First District Court's decision constituted just such a "bait and switch." In other words, the Florida scheme was impermissible because it held out two alternative remedies to the taxpayer. One being a prepayment remedy, a suit under § 72.011, Fla. Stat., which could be brought prior to paying the tax with no penalty. While the other was a postpayment remedy, a suit for refund pursuant to § 215.26, Fla. Stat., which could be brought after payment of the tax. The court reasoned that Florida could not now deny the chance for a refund after the taxpayers paid the tax relying on the availability of a refund if the tax was found unlawful.

> Under Florida law there was a long standing practice of permitting taxpayers to seek refunds under § 215.26 for taxes paid under an unconstitutional statute.
>
> While Florida may be free to require taxpayers to litigate first and pay later, due process prevents it from applying this requirement to taxpayers, like Newsweek, who reasonably relied on the apparent availability of a postpayment refund when paying the tax.

Newsweek, 118 S. Ct. 904 at 905.

It was on the basis of this apparent "bait and switch" that this Court vacated the opinion of the First District Court and remanded the case to the First District for further proceeding not inconsistent with the court's opinion in *Newsweek v. Florida Department of Revenue*, 118 S. Ct. 904 (1998).

The factual and legal circumstances in *Newsweek* are completely dissimilar to the situation in the instant case. In the instant case the County does not contest that the Petitioners are equally as entitled to a postdeprivation remedy as they are a predeprivation remedy. Rather the County asserts that, as stated by the Florida Supreme Court:

> Where an invalid tax scheme applies across the board and confers a commensurate benefit, on the other hand, "equitable considerations" may preclude a refund. *Gulisian v. Dade County School Bd.*, 281 So.2d 325 (Fla. 1973)
>
> In the present case, the 1989 and 1990 assessments fall into the latter category. The assessments were non-discriminatory (i.e., they applied across the board to all property owners in the county) and they conferred a commensurate benefit (i.e., they provided for garbage collection and disposal, landfill closure, ambulance service, and fire protection). Further, the county acted in good faith in imposing the assessments. Competent substantial evidence supports the denial of refunds for 1989 and 1990.

(App. 21a-22a). *Newsweek* does not change these findings or the law that is to be applied. The holding of the Florida Supreme Court set out above is equally applicable to the instant case whether applied as part of a predeprivation or postdeprivation analysis.

Whether the petitioners received commensurate benefits which preclude refund can be decided in either a pre or post deprivation setting.

II.

NEITHER THE DUE PROCESS CLAUSE NOR THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION MANDATES REFUNDS OF SPECIAL ASSESSMENTS OR OTHER LEVIES INVALIDATED FOR PURELY STATE LAW REASONS.

In the instant case, Respondent, by ordinance, levied special assessments, not taxes, to fund certain county services. The levying ordinances were determined by the First District Court of Appeal to be invalid due to procedural irregularities. *Madison County v. Foxx* (App. 68a-101a). Under Florida Law, and the general law, special assessments are not taxes because special assessments are charges which the county levies to recoup the special benefit and value provided by the county to particular property. Further, special assessments must be fairly and reasonably apportioned among the properties that receive the special benefit. *City of Boca Raton v. State of Florida*, 595 So.2d 25 (Fla. 1992). The instant special assessments were not and have not to this day been determined to violate any provision of Federal law or the Federal Constitution. In fact, the same type of special assessments, which did not have the same procedural irregularities, have been recently upheld by the Florida Supreme Court as proper under the law. *Lake County v. Water Oak Management Corp.*, 695 So.2d 667 (Fla. 1997); *Harris v. Wilson*, 693 So.2d 945 (Fla. 1997); *Sarasota County v. Sarasota Church of Christ*, Inc., 667 So.2d 180 (Fla. 1995).

Thus, this case does not involve a situation where a tax, much less a special assessment, violates Federal law. Here the special assessments, enacted by county ordinance of the Board of County Commissioners of Madison County, Florida were not determined to be illegal, but merely void for not meeting the procedural requirements for ordinances enacting special assessments under the laws of the State of Florida. (App. 88a-90a). Accordingly, *McKesson*, and other decisions of this Court do not mandate refunds.

The State Supreme Court of Utah has recently considered this issue in the case of *Kennecott v. State Tax Com'n*, 862 P.2d 1348 (Utah 1993). In the *Kennecott* case, the Supreme Court of Utah struck down a Utah State statute for violating its State Constitution. The petitioners sought refunds of the amount of the assessments paid pursuant to the stricken law, and cited the *McKesson* case as authority for the proposition that the Federal Constitution mandated such refunds. The Utah Court flatly rejected such assertion:

> *McKesson* is inapplicable here. In *McKesson*, the Court repeatedly stated that its decision was based on Florida's violation of the Commerce Clause. In this case, the tax scheme was stricken as a violation of the Utah Constitution's prohibition against unequal taxation. No Federal law was involved. This court has repeatedly recognized that "[t]he purely prospective application of a state court decision overruling prior authority in a civil case [involving state law] violates no right under the United States Constitution." Thus, federal law does not govern the question of whether a state court decision

> involving state law should be applied retroactively or prospectively.

Kennecott, 862 P.2d 1348 at 1353.

In reaching this conclusion the Utah Supreme Court relied upon this Court's opinion in the case of *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932) in which Justice Cardozo stated:

> [T]he Federal Constitution has no voice upon the subject [of retroactivity versus prospectivity]. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. . . .
>
> The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature. We review, not the wisdom of their philosophies, but the legality of their acts.

Kennecott, 862 P.2d 1348, at 1353, and *Great Northern Railway*, 287 U.S. 358, at 364-365.

Since the Federal Constitution has no voice on the subject, *Great Northern Railway, supra*, the petitioners' due process and equal protection arguments cannot apply.

This position, as well as the continued vitality of the *Great Northern Railway* case are supported by *McKesson*'s companion case *American Trucking Association, Inc. v. Smith*, 496 U.S. 167 (1990),

> When questions of State Law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions. *See Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 53 S. Ct. 145, 77 L. Ed. 360 (1932) ("We think the federal constitution has no voice upon the subject [of whether a state court may decline to give its decisions retroactive effect]").

American Trucking, 496 U.S. 167, at 177.

The Court of Appeals for the Fifth Circuit has also addressed this proposition of law in its opinion of *Wilson v. Valley Electric Membership Corp.*, 8 F.3d 311 (5th Cir. 1993). This case concerned whether customers of a rural electric cooperative would receive a refund of rate increases which allegedly violated the Louisiana Constitution, but did not violate the laws or Constitution of the United States. The court of appeals approved the order of the trial court which abstained from considering the case in favor of state-court review. The court's decision was based in part on the recognition that:

> There are only state law issues in this case. These are, first, whether the Louisiana Supreme Court's decision in *Cajun Electric*[1] should apply retroactively, and, second, if so, whether it invalidates prior rate increases. The Supreme Court has declared: "When questions of State

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1. *Cajun Elec. Power Coop., Inc. v. Louisiana Pub. Serv. Comm'n*, 544 So.2d 362 (La. 1989), *cert. denied*, 493 U.S. 991 (1989).

> Law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions." *American Trucking Ass'n v. Smith*, 496 U.S. 167, 177, 110 S. Ct. 2323, 2330, 110 L. Ed. 2d 148 (1990) (plurality opinion) (citing *Great N. Ry. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364, 53 S. Ct. 145, 148, 77 L. Ed. 360 (1932)).

Wilson v. Valley Electric Membership Corp., 8 F.3d 311, at 314 (5th Cir. 1993).

This Court has explained its rulings on whether due process requires refunds in the recent case of *Reich v. Collins*, 513 U.S. 106 (1994). In *Reich*, this Court explained *McKesson* and the cases on which it was based as follows:

> Reich then petitioned the Georgia Supreme Court for reconsideration of its decision on the grounds that even if the Georgia tax refund statute does not require a refund, federal due process does-due process, that is, as interpreted by *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. Of Business Regulation*, 496 U.S. 18, 110 S. Ct. 2238, 110 L. Ed. 2d 17 (1990), and the long line of cases upon which *McKesson* depends. *See id.*, at 32-36, 110 S. Ct., at 2247-2250, citing *Iowa-Des Moines Nat. Bank v. Bennet*, 284 U.S. 239, 52 S. Ct. 133, 76 L. Ed. 265 (1931); *Montana Nat. Bank of Billings v. Yellowstone County*, 276 U.S. 499, 48 S. Ct. 331, 72 L. Ed. 673 (1928); *Carpenter v. Shaw*, 280 U.S. 363, 50 S. Ct. 121, 74 L. Ed. 265 (1930); *Ward v. Board of County Commr's*

> *of Love County*, 253 U.S. 17, 40 S. Ct. 419, 64 L. Ed. 751 (1920); *Atchinson, T. & S.F.R., Co. v. O'Conner*, 223 U.S. 280, 32 S. Ct. 216, 56 L. Ed. 436 (1912); *see generally* Fallon & Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 Harv.L.Rev. 1733, 1824-1830 (1991). As we said, these cases stand for the proposition that "a denial by a state court of a recovery of taxes *exacted in violation of the laws or constitution of the United States* by compulsion is itself a contravention of the Fourteenth Amendment." *Carpenter, supra* (emphasis added).

Reich v. Collins, 513 U.S. 106 at 109 (1994).

Thus, the cases cited by the Petitioners, *Reich v. Collins*, 513 U.S. 106 (1994); *Ward v. Love County*, 253 U.S. 17 (1920); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991); *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993); etc., are inapplicable due to the fact that they deal with violations of the Federal Constitution or Federal law. Thus, this Court should not mandate refunds here because the instant case is free of Federal Constitutional issues.

The decisions of this Court, cited by the Petitioners in their attempt to apply Federal due process and equal protection jurisprudence to the instant case, do not apply to judgments based solely on state law. Therefore they do not conflict with the Florida Supreme Court's decision in the instant case, and will each be addressed accordingly.

In *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991) the United States Supreme Court decided whether the courts of the State of Georgia could deny a refund to the distillers who paid a Georgia State tax which violated the Commerce Clause of the United States Constitution. This was the same type of tax which the Florida Supreme Court invalidated because it violated the Commerce Clause of the United States Constitution in *Division of Alcoholic Bev. and Tobacco v. McKesson*, 574 So.2d 114 (Fla. 1991), and for which this Court ordered the State of Florida to provide a remedy in *McKesson v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990).

This Court, in *Beam*, found that the State did in fact have to give a refund and, as the petitioners assert, disapproved selective prospectivity. This however does not mean that the *Beam* decision is in conflict with the Florida Supreme Court's decision in the instant case.

Beam, dealt with issues of *Federal* law and the remedies which states must give to persons who have had their *Federal* rights violated. This makes *Beam* completely dissimilar from the case at hand as the instant case only involves issues of *state* law. As the Court stated in *American Trucking Assoc. v. Smith*, 496 U.S. 167 (1990),

> When questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions. *See Great Northern R. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364, 53 S. Ct. 145, 148, 77 L. Ed. 360 (1932) ("We think the federal constitution has no voice on the subject [of whether a state court may decline to give its

> decisions retroactive effect]"). The retroactive applicability of a constitutional decisions of this Court, however, "is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied."

American Trucking Assoc. v. Smith, 496 U.S. 167, 177-178 (1990).

Therefore the *Beam* opinion, as it concerns selective prospectivity or any other issue of retroactivity is binding precedent on State Courts only when deciding Federal issues. As this case does not involve the violation of any Federal right or other Federal issue, this Court is not bound to follow the reasoning of *Beam* as it concerns prospectivity.

Further, even if this Court were bound to follow the reasoning of *Beam* as it pertains to prospectivity, the opinion in *Beam* is not inconsistent with the opinion issued in this case.

As interpreted by this Court's later opinion in *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993) this Court's opinion in *Beam* does not mandate refunds of taxes in all cases. In *Harper* the state courts of the State of Virginia refused to apply an opinion of this Court retroactively. The issue in *Harper* concerned the disposition of the taxes levied by the State of Virginia on federal employees' retirement benefits. The United States Supreme Court decided that the taxing of federal employees' retirement benefits, under the then existing laws of the State of Virginia, violated the protections of the United States Constitution.

In *Harper*, this Court ruled that all courts would have to give the United States Supreme Court's application of a rule of Federal law retroactive effect.

> *Beam* controls this case, and we accordingly adopt a rule that fairly reflects the position of a majority of the Justices in *Beam:* When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and to all events, regardless of whether such events predate or postdate our announcement of the rule.

Harper v. Virginia Dept. of Taxation, 509 U.S. 86 at 97 (1993).

However, after ruling that the decision would apply retroactively, *the Court refused to order a refund of the taxes at issue.*

> Because we have decided that *Davis* applies retroactively to the tax years at issue in petitioners' refund action, we reverse the judgment below. We do not enter judgment for petitioners, however, because federal law does not necessarily entitle them to a refund. Rather the Constitution requires Virginia "to provide relief consistent with federal due process principles." *American Trucking*, 496 U.S., at 181, 110 S. Ct., at 2332 (plurality opinion).

Harper v. Virginia Dept. of Taxation, 509 U.S. 86 at 100 (1993).

Thus, even under the opinions cited by the Petitioners, which require retroactive application of rules of Federal law, this Court has not mandated refunds in every case. Rather, the courts provide relief consistent with the Federal due process principles.

III.

THE DENIAL OF REFUNDS CANNOT BE SAID TO DENY ANY PERSON DUE PROCESS AS EVERYONE WHO PAID THE SPECIAL ASSESSMENTS RECEIVED A COMMENSURATE BENEFIT IN THE FORM OF THE SPECIAL BENEFITS ENJOYED BY THE PROPERTY SO ASSESSED, FURTHER THE LEVYING AUTHORITY CANNOT BE SAID TO HAVE ACTED IN BAD FAITH AS THE STATE COURTS CONFIRMED THAT THIS AREA OF STATE LAW WAS UNSETTLED AND SUBJECT TO VARYING INTERPRETATIONS.

The Florida Supreme Court's opinion does address Federal due process principles as they pertain to this case:

> Where an invalid tax scheme discriminates among citizens without a legal basis and bestows no commensurate benefit, a refund may be in order. *Department of Revenue v. Kuhnlein*, 646 So.2d 717 (Fla. 1994). Otherwise, the tax could constitute an unlawful taking of property in violation of state and federal rights. *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990). Where an invalid tax scheme applies across the board and confers a commensurate benefit, on the other hand,

> "equitable considerations" may preclude a refund. *Gulesian v. Dade County School Bd.*, 281 So.2d 325 (Fla. 1973).
>
> In the present case, the 1989 and 1990 assessments fall in the latter category. The assessments were non-discriminatory (i.e., they applied across the board to all property owners in the county) and they conferred a commensurate benefit (i.e. they provided garbage collection and disposal, landfill closure, ambulance service, and fire protection). Further the county acted in good faith in imposing these assessments.

(App. 21a-22a).

The commensurate benefit enjoyed by the people subject to the special assessments allows the court to deny a refund because no person can claim they were asked to pay for any service they did not receive. The fact that the petitioners each received a commensurate benefit satisfies the Federal due process principles in this case. Special assessments generally, and the special assessments in this case in particular, are not taxes, in that a tax is a levy which the individual must pay without any guarantee that he will receive anything in return. Special assessments, however, are levies which must be no greater than the amount of special benefit the owner's property receives from the service provided. *City of Boca Raton v. State of Florida*, 595 So.2d 25 (Fla. 1992). Thus, it would be inequitable to require Madison County to refund the special assessments levied in this case, to property owners who have already

enjoyed the special benefits and attendant value of the services provided.

The Petitioners assert that the Florida Supreme Court never addressed the "inequity" created by the fact that the property owners who paid during the first two years will not get a refund while the property owners who did not pay will not be required to pay.

As stated in the majority's opinion in consideration of the fact that these charges applied across the board and conferred a commensurate benefit, the court determined that these "equitable considerations" precluded a refund. (App. 22a).

Finally, the Petitioners raise the procedural problems with the enactment of the county ordinances which levied the special assessments as evidence of bad faith and that since the Petitioners had filed suit, the County was on notice as to the doubtful validity of the ordinances. This issue was best addressed by the District Court in *Madison County v. Foxx*, and later in *Dryden v. Madison County*, when it said,

> We have briefly, but by no means exhaustively, outlined the legislative history of the pertinent provisions of section 125.01 to illustrate that this statute and its legislative history, do not conclusively answer the question of the authority of counties to impose special assessments within municipalities, nor does the body of case law cited by the parties. That experienced lawyers, who have argued cases on the meaning of these statutes and the constitutional provisions for several years — one

> nearly a quarter of a century ago — argue vehemently such divergent interpretations of these statutes is testimony to their confusing message and the need for legislative action.

(App. 38a, 90a).

As was stated by the District Court it was not apparent that the ordinances in question were flawed. The counties should not be viewed as having acted in bad faith by relying on their counsel's interpretation of a statute which the District Court concluded did not conclusively answer the question.

CONCLUSION

For the reasons stated, that this case involves mere local issues surrounding the enactment of a county ordinance under state law, and that there are no Federal constitutional rights which have been impinged, this Court is impelled to deny this petition.

Respectfully submitted,

GEORGE T. REEVES
Counsel of Record
E. BAILEY BROWNING, III
DAVIS, BROWNING
& SCHNITKER, P.A.
P.O. Drawer 652
Madison, Florida 32341
(850) 973-4186

KEN VAN ASSENDERP
YOUNG, VAN ASSENDERP
& VARNADOE, P.A.
P.O. Box 1833
Tallahassee, Florida 32303-1833
(850) 222-7206

Attorneys for Respondent